Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78- 78-5617

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-v.-

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

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STATE OF MONTANA,

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Montana entered June 7, 1978.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Montana, reported at __Mont. __, 581 P.2d 1205 (1978), is set out in Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Montana was entered on June 7, 1978. On July 25, 1978, that court denied a timely rehearing petition. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death by hanging for the crimes of deliberate homicide and aggravated kidnapping under the law of Montana violate petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?

2. Whether the Montana Supreme Court's ruling on remand from this Court that a criminal defendant may be required to prove by a preponderance of the evidence that he lacked the capacity to form a criminal mental state that is an element of an offense, and its consequent approval of the trial court's instructions to the jury in this case, violated petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to require the State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged?

3. Whether the failure of the courts below to enforce a plea bargaining agreement between petitioner, the State, and the trial court, on which petitioner's counsel had relied in revealing petitioner's trial strategy and tactics to the State prior to trial, deprived petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

4. Whether the introduction at trial of evidence seized from petitioner's dwelling place and truck parked outside his

dwelling place pursuant to a search warrant violated his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and various sections of the Montana Revised Codes Annotated as set forth in Appendix D infra.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Montana, entered on June 7, 1978, reaffirming petitioner's conviction and death sentence. Petitioner, Duncan Peder McKenzie, Jr., was convicted of deliberate homicide and aggravated kidnapping on February 1, 1975, after a jury trial in the District Court of the Eighth Judicial District in and for the County of Cascade, Montana, and was sentenced by the trial court to be hanged. The Montana Supreme Court affirmed, State v. McKenzie (I), 557 P.2d 1023 (Mont. 1976) and this Court remanded "for further consideration in light of Patterson v. New York," 432 U.S. 197 (1977), 433 U.S. 905 (1977). On remand, the Montana Supreme Court adhered to its original decision, State v. McKenzie, (II), __Mont.__, 581 P.2d 1205 (1978).

Ms. Lana Harding, the victim of the kidnapping and murder, was last seen alive about 5:00 p.m., January 21, 1974, in Conrad, Montana, about 13 miles from the living unit (or "teacherage") near the rural public schoolhouse where she taught, T. 1630, 2156, 2158.[1/] When she failed to appear at

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1/ References to papges of the trial transcript will hereinafter be preceded by "T.", and references to documents contained in the "Court File" record in the Montana Supreme Court will be preceded by "Ct. File Item."

school the next morning the county sheriff was notified, T. 473; the sheriff and deputies came to the teacherage and searched the premises. This search produced: a red tennis shoe found outside the door of the teacherage, T. 1635; some scuff marks, two mats out of place, and a pair of glasses found inside the teacherage. Deposition of Deputy Jerry Hoover, Ct. File Item 30, at p.6; what appeared to be a "drag trail" leading out of the teacherage, under a fence, up to the road in front, ibid; T. 2125; and a spot of what appeared to be blood near the end of the trail by the road, with a woman's watch nearby. T. 900-901, 2018. Officers spoke to a neighbor of Ms. Harding's -- one Dan Pearson who lived across the road from the teacherage. Mr. Pearson told the officers that the previous evening, a man had come to his door and had asked for help in starting his pick-up truck. This man, who Pearson characterized as "nervous" and who identified himself as Duncan McKenzie, had phoned his wife from Pearson's house. T. 2010. The two men then had gone to the truck, which was parked near where the officers found the watch and apparent blood stain, and had started the truck. T. 216-217; Deposition of Justice of the Peace Robert Wolfe, Ct. File Item 30, at pp. 6-7.

Later during the day Ms. Harding was found to be missing, Pondera County Attorney David Nelson visited the teacherage and talked to Deputy Jerry Hoover, who had been involved in the search, T. 2015. The two men returned to Conrad in the

late afternoon, T. 2016, where Nelson executed an "affidavit"[2] reciting the facts then known to the investigators, and drafted a criminal complaint charging petitioner with a misdemeanor assault upon Lana Harding. Ct. File Item 60. Nelson explained to Justice of the Peace Robert Wolfe what he had learned and been told. The Justice of the Peace placed Deputy Hoover under oath and asked him a few questions. No court reporter was present, and no contemporaneous record was made of Hoover's testimony. Ibid.[3]

At the conclusion of these proceedings, Justice of the Peace Wolfe signed warrants for petitioner's arrest and for the search of his "residence . . . and the surrounding [curtilage] area" and of "a 1950 black Dodge Pickup truck there." The search warrant authorized seizure of several items of clothing "worn by the Defendant," of several other items of woman's clothing, "and any other controband [sic] articles." Ct. File Item 76.

Pursuant to these warrants, County Attorney Nelson, the Sheriff, and several of his deputies went to the petitioner's residence at around 7:00 p.m. the same evening, T. 2017-2018, arrested petitioner, seized both his pick-up truck (which was parked just in front of his house, T. 905) and its contents (T. 2019); the officers searched his house, removing from it several items of his clothing, T. 2022 and took clothing as well as pubic and head hairs from petitioner. The pick-up was taken to a garage in Conrad and searched the next day. T. 736, 740.

2/ This "Affidavit" is reproduced in the dissenting opinion of Justice Shea in State v. McKenzie (II), supra, 581 P.2d at 1240-41.

3/ According to Wolfe's testimony, Hoover told him of Ms.

Ms. Harding's partially nude body was found on January 23 a few miles from the teacherage, T. 467-468, 1979, clothed in a blouse, sweater, and bra, with a number of severe head wounds, T. 562, and a rope twisted about the neck, T. 553, 585-586.[4]

On January 24, 1974, petitioner was charged by information with the deliberate homicide of Lana Harding. Ct. File Item 4.[5] On December 3, 1974, venue of the trial was changed to Cascade County, Montana, T. 3, and several motions by appointed defense counsel -- including a motion to suppress the evidence seized from petitioner's house and truck, T. 2 -- were denied.[6] On

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3/ (Cont'd.)

Harding's disappearance, the scuff marks on the floor of her house, the other items "out of place" there, the tennis shoe found outside her door, the "drag marks" leading up to the road, the presence near the road of a woman's watch and something that "looked like it was blood," and the encounter Dan Pearson had had the night before with petitioner. Deposition of Justice of the Peace Robert Wolfe, Ct. File Item 30, at pp. 5-8. See pp. 53-57, infra.

4/ Other items ultimately introduced in evidence were discovered in farm fields several miles from the teacherage or at the site where the body was discovered: a pair of leather work gloves with what appeared to be specks of blood on them, T. 897, a pair of rubber men's overshoes, T. 2140, and a woman's purse, T. 2147.

5/ During the next eight months, three "Amended Informations" were filed by the State. Ct. File Items, 16, 33, 74.

6/ The order denying the motion to suppress, Ct. File Item 90, contained no findings or conclusions and did not specify the grounds on which the searches were sustained. Petitioner sought but could not obtain such findings from the court. T. 13-14.

December 17, 1974, the trial court entered for petitioner a plea of "not guilty", T. 19, to two counts of deliberate homicide, two counts of aggravated kidnapping, one count of sexual intercourse without consent, and two counts of aggravated assault charged in the third amended information.[7]

Within a few days of the entry of petitioner's plea, counsel for the defense and state engaged in plea bargaining discussions which culminated in an agreement that petitioner would be allowed to plead guilty to deliberate homicide and aggravated assault and that the State would waive the death penalty. Affidavit of Barney Reagan, Esq., Ct. File Item 99, at p.2. On December 23, the trial judge, Hon. R. J. Nelson, agreed to accept the pleas, with a slight modification in the sentencing agreement. Ibid. But on December 28, 1974, -- after defense counsel had disclosed his trial strategy in reliance on the plea agreement in order to assist the prosecution in justifying the plea to the community and the victim's family, Id. at 3-4 -- the State announced it was abrogating the agreement because of objections voiced by Ms. Harding's family, Id. at 3-4, see p. infra. Over defense objections, the trial court ruled that the case would proceed to trial, T. 6 (December 30, 1974), and permitted the State to endorse fifty-eight new witnesses on the

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7/ The two homicide and two kidnapping counts charged a single instance of homicide and kidnapping respectively, but alleged different methods of commission. See Ct. File Item 74.

day of trial. Ct. File Item 113; T. 80-81, 88, 91. The defense claimed these witnesses were called to counter the trial strategy defense counsel had revealed in reliance on the broken plea bargain agreement. Defendant's Objections, Ct. File Item 114, at p. 2.

Over defense objections, the jury selected on January 8, 1975 was not sequestered, T. 78, 233, 498. The trial judge opened the trial with extensive "preliminary instructions" on matters of law. T. 453. The State established that Lana Harding had died from multiple wounds to the head, T. 560, inflicted by a large, heavy instrument, T. 565. The State's pathologist testified[8] that he could not determine the exact time of death, T. 1424, but that the blows were all inflicted within thirty minutes of death, T. 563, and that the most severe blow preceded death by only a few minutes, T. 564.[9]

8/ Because the pathologist testified that it was possible to present his findings and render his opinion without photographs, petitioner objected to the introduction of photographs the pathologist had taken on the ground that they were inflammatory and unnecessary. One Justice of the Montana Supreme Court dissented from that court's original affirmance of petitioner's conviction and death sentence on the ground that admission of these photographs constituted reversible error. State v. McKenzie (I) supra, 557 P.2d at 1046-1048 (Boyd, J., dissenting).

9/ The pathologist noted also that a clothesline rope found around the neck of the body had been tightly enough constricted sometime before the blows were inflicted to the head and between thirty and ninety minutes prior to death, T. 586-588, to cause a loss of consciousness. The doctor also found a tear in the tissue about Ms. Harding's vaginal orifice and a small amount of blood, indicative of sexual intercourse somewhere around the time of death, T. 601, and male seminal fluid in the pubic hair, ibid., but it was impossible to determine when the deposit had been left, T. 602, 1455.

The State sought to link petitioner to Ms. Harding's death primarily through the testimony of Dan Pearson, T. 2160-2175, and Pearson's father, Gundar, T. 2148-2155, that petitioner had sought assistance in starting his stalled truck near the teacherage the evening of January 21, and through the introduction of a mass of physical evidence[10] -- much of it seized from petitioner's truck and house[11] -- which tended to indicate petitioner's involvement in her abduction.[12] The

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10/ The order of the State's presentation was significantly altered from the chronological sequence of events due to the introduction of voluminous testimony concerning the chains of custody over the various items introduced. See, e.g., 474-787, 521-527, 634-637, 646-657, 670-685, 699-717, 767-777, 805-825, 956-972, 1095-1108, 1469-1538, 1919-1955. Establishing the chain of custody with respect to various evidentiary items had been a primary weakness in the State's case perceived by defense counsel and revealed by them to the State in reliance on the subsequently abrogated plea agreement.

11/ Two items taken from petitioner's house were introduced into evidence against him, T. 1062, 2091: a pair of boots, T. 778-779, with a small trace of blood on one of them, T.1035, the soles of which were similar to prints inside overshoes found discarded in a farm field about two miles from the teacherage, T. 897, with blood and brain tissue on them, T. 1061-1062; and a shirt belonging to petitioner which also had untypeable human blood on it, T. 1205. A number of objects and samples taken from petitioner's truck were also introduced into evidence: an exhaust manifold, T. 1949, similar to the instrument which could have inflicted the fatal wounds on Ms. Harding, T. 1397, which had type O blood T. 1117, brain tissue, T. 1395, and hair similar to Ms. Harding's T. 1298, under fresh paint on it; a coil of wire, part of which matched a piece of wire found in Ms. Harding's hair, T. 1126; several scrapings from parts of the truck, T. 970, 976-979, which contained type O blood, T. 1188-1192, and sweepings which contained hairs which were microscopically similar to Ms. Harding's, T. 1294-1296, 1307, 1381, and a number of hardware items from the bed of the truck, see, e.g., T. 1872, 1877, 1878, 1935, 1946, with blood, sometimes identifiable as type O, on them, see, e.g., T. 1095-1097, 1103-1112, 1141.

12/ In addition to the items seized from petitioner pursuant to the warrants, the State offered several other items of physical evidence and scientific testimony about them tending to link petitioner to the crime. Most significantly, it showed that petitioner's blood was "O" positive and that he was a

State also offered testimony from two of petitioner's co-workers that he had made statements indicating a sexual interest in "country school teachers" in general, T. 2054, and Ms. Harding in particular, T. 1897.

Petitioner, who had a prior conviction for assaulting a woman, T. 2615, did not testify.[13] While he challenged the persuasiveness of the State's evidence to prove the elements of the offenses charged[14] and also sought to demonstrate that some of this evidence may have been tampered with,[15] most of

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12/ (Cont'd.)

"secretor" (i.e., that his blood type could be determined from his saliva or semen) T. 619. The semen found in Ms. Harding's pubic hair, T. 613, the tests revealed, had come from a male with "O" type blood. A pair of gloves was found discarded, T. 897, in the same general area where Ms. Harding's purse and the pair of overshoes with human blood on them, T. 1032, were also found, T. 2140, 2147, and these gloves were similar to work gloves petitioner had been seen wearing, T. 1749. The gloves had stains on them similar in color to the "Red Top" seed treat used at the seed store where petitioner worked, T. 1155.

13/ Petitioner initially refused to enter a plea of "not guilty by reason of mental disease or defect excluding responsibility" or to give the statutorily required notice of such a defense. He claimed that the 1973 Montana Criminal Code's "mental disease or defect" provisions were unconstitutional because (1) they placed upon petitioner the burden of establishing the affirmative defense of mental incompetence by a preponderance of the evidence, and (2) they placed upon petitioner the burden of controverting the assumption that he possessed the requisite mental elements for deliberate homicide, once the State had established an illegal killing. See pp.36-45, infra. Petitioner refused to give the statutorily required notice for fear of waiving his constitutional objection to the "mental disease or defect" rules. See Ct. File Items 24, 27, 28, 37, 40.

14/ See, e.g., T. 593, 602, 1444, 1455, 1233-1276, 2338-2378.

15/ Defense witnesses testified that, after petitioner had been taken into custody, Ms. Harding's purse had not been found on the night of January 22 in a careful search of the area where it was subsequently found January 23, T. 2218, and that the pickup truck from which so many crucial items of

petitioner's own evidence was addressed to the question of whether he could have acted "knowingly" or "purposely" in the commission of a homicide. The trial court construed petitioner's defense as that of "mental disease or defect excluding responsibility." T. 1427-1435. A psychiatrist appointed to examine petitioner, Dr. Robert Wetzler, testified that petitioner was a "schizoid personality," T. 2248, who was unable to form the requisite mental elements of deliberate homicide and aggravated kidnapping, who was unable to appreciate the criminality of his conduct, and who was unable to conform his conduct to the requirements of law, T. 2248, 2321.

In rebuttal, the State introduced the testimony of another psychiatrist who had examined petitioner, Dr. Meguel F. Gracia, who testified that petitioner possessed a "passive-aggressive personality" and "social maladjustments," T. 2396, but that he was not afflicted with a "mental disease" and could appreciate the criminality of his conduct, T. 2397.[16] A state psychologist

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15/ (Cont'd.)

evidence had been taken had, for a time at least, been left unguarded after it was seized and thus could have been tampered with, T. 2231.

16/ Dr. Garcia based this conclusion partially on his observations of petitioner's "thought content" in refusing, on the advice of his attorney, to discuss the crime with which he was charged, T. 2400. Dr. Garcia concluded that this refusal was "rationalization". Other "symptoms" which Dr. Garcia cited in support of his diagnosis that petitioner possessed merely a "personality disorder" were "insecurity," T. 2409, "hostility," T. 2411, and suppressed anger, T. 2413-2414.

testified concerning his "diagnostic impression", on the basis of testing, that petitioner had a "personality disorder", T. 2559, but that he could appreciate the criminality of his conduct and conform it to law, T. 2547.

Over petitioner's objection, the trial court instructed the jury that "the defendant must prove by a preponderance of the evidence that he suffered from such an abnormality or subnormality of the mind at the time of such conduct that the jury cannot say that it does not have a reasonable doubt as to his responsibility for such conduct." Add. Instr. 53, Ct. File Item 154. The trial court also instructed, over objection, that the jury could consider evidence of "mental disease or defect" which petitioner had introduced on the question whether petitioner had the requisite mental elements of the crimes charged, but that the burden was on petitioner to show the absence of those mental elements due to a "mental disease or defect." See pp. 36-45, infra.

Six possible verdicts were submitted to the jury,[17] and

17/ These verdicts were: "Mental Disease or Defect Excluding Responsibility for Conduct," "Deliberate Homicide" (with or without torture), "Aggravated Kidnapping" (with or without causing the death of the victim), "Sexual Intercourse Without Consent,""Aggravated Assault," "Kidnapping," "Not Guilty of Any of the Offenses Charged." Add. Instr. 54, Ct. File Item 154.

it found petitioner guilty of "Deliberate Homicide by Means of Torture," and "Aggravated Kidnapping", accompanied by the death of the victim. T. 2605. The trial court ordered the preparation of a pre-sentence investigation report, which was disclosed to petitioner, and a sentencing hearing was held on March 3, 1975, before the trial court, sitting without a jury, as required by Montana law. In written "Findings, Conclusions, Sentence and Order," Ct. File Item 169; attached infra as Appendix B, the trial court stated that "[t]he evidence in the case, and as found by the jury discloses a brutal, conscienceless, torture, rape and deliberate killing of a human being," id. at 7; that petitioner could distinguish right from wrong but was "dangerous and potentially dangerous", ibid.; that he had previously been convicted of an aggravated assault on a woman and that the chances of his rehabilitation were "practically nonexistent," id. at 8, and that under Montana law "he would only be required to service [sic] approximately seven years . . . before he would be turned loose to menace society again," id. at 9. The trial court found that "there are no circumstances which mitigate the defendant's conduct or the sentence to be imposed," ibid., and sentenced petitioner to be hanged for deliberate homicide and aggravated kidnapping.[18]

18/ Petitioner was not sentenced separately for these two crimes. The trial court concluded that "[t]he offenses of which the defendant had been found guilty are of equal gravity before the law and result from the same transaction, and therefore only one sentence may be imposed though he was found guilty of two offenses." Findings, Conclusions, Sentence and Order, Ct. File Item 169, at p.9.

On November 12, 1976, the Supreme Court of Montana affirmed petitioner's conviction and sentence, with one Justice dissenting. State v. McKenzie (I), supra.

On June 27, 1977 this Court granted certiorari, vacated petitioner's sentence and remanded the case for reconsideration in light of Patterson v. New York, supra, 433 U.S. 905 (1977). On remand a differently composed Montana Supreme Court[19] purported to have "reconsidered the entire case, not only in the light of Patterson, but also on all issues raised in the original appeal to this Court," State v. McKenzie (II), supra, 581 P.2d at 1210, and found "no reversible error," 581 P.2d at 1235. One Justice dissented from the affirmance of the admission of "evidence seized pursuant to a search warrant" and "the decision upholding the death penalty," asserting that the court had "effectively ruled that a brutal, heinous murder justifies the State of Montana in suspending the operation and application of the Constitution . . . ." Ibid. (Shea, J., dissenting).

19/ Justice Boyd, who dissented from the Montana Supreme Court's original affirmance of petitioner's conviction because of the admission of photographic evidence that he found could "serve no other purpose than to arouse the emotions and passions of the jury," State v. McKenzie (I), supra, 557 P.2d at 1048, did not participate in the reconsideration on remand from this Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner filed a Petition and Motion in Mitigation, in the trial court, Ct. File Item 162, urging that the 1973 Montana death penalty statute was unconstitutional under "the rule expressed in Furman v. Georgia," and under the Eighth Amendment to the Constitution of the United States, id. at 1, 4, and he moved the trial court "[t]o not impose a sentence of death," id. at 5. Petitioner's Specification of Error No. 25 alleged that petitioner's sentence of death was imposed in violation of the "Fifth, Sixth, Eighth, Ninth & Fourteenth" Amendments to the Constitution of the United States, brief of Appellant at 466, and the Montana Supreme Court twice rejected this contention. State v. McKenzie (I), supra, 557 P.2d at 1028-1034; State v. McKenzie (II), supra, 581 P.2d at 1229.

II. During trial, petitioner filed a written "Motion to Require Proof of Ability to Have a Particular Mental State," Ct. File Item 143, and submitted a proposed instruction that "the State must prove that Defendant had the necessary state of mind to have acted . . . either 'knowingly' or 'purposely' beyond a reasonable doubt," Defendant's Instruction No. 13, Ct. File Item 153. The trial court denied this Motion and refused the instruction, T. 2208, 2598-2599. Petitioner's Specification of Error No. 19 raised this issue in the Montana Supreme Court, Brief of Appellant at 364-369. That court rejected this contention. On remand the Montana court reaffirmed this holding, ruling that "[e]lements of the offense may still be presumed . . . from proof of other facts," State v. McKenzie (II), supra, 581 P.2d at 1222, that "a defendant must prove

by a preponderance of the evidence that he lacked the ability . . . to form that criminal mental state which is defined by statute as an element of the crime," id. at 1233; that the trial court's instructions, "when read together, . . . required defendant to establish his diminished capacity merely by raising a reasonable doubt," "a more liberal burden of proof than the Constitution required" id. at 1235, and that even if not, since the court was "convinced beyond a reasonable doubt that defendant acted 'purposely' or 'knowingly' . . . if there was any error in the burden of proof, it was harmless." Id. at 1224.

III. On January 3, 1975, before trial, petitioner filed a "Motion to Enforce Agreement of December 23, 1974," Ct. File Item 104, which contended that failure to enforce a plea bargaining agreement deprived petitioner of "due process of the law under the United States . . . Constitutio[n]," id. at 3. This motion was denied, T. 60, and petitioner's Specification of Error No. 2 alleged this refusal to enforce the agreement as error. The Montana Supreme Court held that Santobello v. New York, 404 U.S. 257 (1971), was "not applicable", State v. McKenzie (I), supra, 557 P.2d at 1038, State v. McKenzie (II), supra, 581 P.2d at 1214, and rejected the claim.

IV. Prior to trial, petitioner moved to suppress items seized from his house and truck on the ground that they had been seized in violation of his rights under the Fourth Amendment to the Constitution of the United States, Ct. File Item 50. The trial court entered an order denying this motion, Ct. File Item 90, and petitioner's Specification of Error No. 1 alleged the denial of this motion as error. The Montana Supreme Court held that "'only a probability of criminal conduct need be shown'" for a search warrant and that "items other than those specifically described in [a] search warrant may be seized so long as a reasonable relationship is demonstrated between the search authorized . . . and seizure of the items . . . ." State v. McKenzie (II), supra, 581 P.2d at 1211, 1213; see also State v. McKenzie (I) supra, 557 P.2d at 1034.

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF THE SENTENCE OF DEATH BY HANGING FOR THE CRIMES OF DELIBERATE HOMICIDE AND AGGRAVATED KIDNAPING UNDER THE LAW IN EFFECT IN MONTANA AT THE TIME OF THE OFFENSE FOR WHICH PETITIONER WAS CONVICTED COMPORTS WITH THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This case involves the only death sentence imposed under the 1973 Montana capital punishment statute enacted in the wake of Furman v. Georgia, 408 U.S. 238 (1972),[20] which was amended -- first in 1974 and then again in 1977 -- to provide different procedures for imposition of death sentences for the crimes of "deliberate homicide" and "aggravated kidnaping." Under this

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20/ In 1974, the Montana Supreme Court invalidated the State's previous capital sentencing procedure: "Furman invalidates death sentences imposed under statutes such as our section 94-2505 . . . because of the unfettered discretion lodged in the judge . . . . that allows the sentencer discretion whether or not to impose the death penalty upon conviction." State v. Rhodes, 164 Mont. 455, 524 P.2d 1095, 1099 (1974). The Montana Criminal Code Commission thus explained the Montana Legislature's reaction to Furman:

> "if any capital punishment statute is to achieve constitutional approval it must be both mandatory and specific. Subsection (1) purports to establish mandatory capital punishment by use of the terms 'shall.' This is followed by a humanistic escape valve in the phrase, 'unless there are mitigating circumstances.' The terms are apparently contradictory -- but, in fact, the mandatory language is subject to the exception and ultimately only a test case in the United States Supreme Court can ascertain the constitutionality of the provision."

Criminal Code Commission Comment to Mont. Rev. Codes Ann. §94-5-105 (1973 supp.). This Comment is appended to the provision of the new Criminal Code authorizing the death penalty for deliberate homicide. The Commission Comment to the aggravated kidnaping penalty provision states this explanation is "applicable to this section" as well. Criminal Code Commission Comment to Mont. Rev. Codes Ann. §94-5-304 (1973 supp.).

statute, a death sentence is required to be imposed by the court for six categories of "deliberate homicide" and the offense of kidnaping unless the trial court, sitting without a jury, finds that there are "mitigating circumstances." Mont. Rev. Codes Ann. §94-5-304 (1974 supp.) [21]

The determination whether sufficient undefined "mitigating circumstances" exist to justify the imposition of a sentence less than death under this statute is to be made "exclusively" by the trial court. Mont. Rev. Codes Ann. §95-2212 (1969). No standards or procedures are provided to guide this sentencing discretion.

When the Supreme Court of Montana vacated pre-Furman death sentences in 1974, it commented that:

> "Subsequently [to Furman], the Legislature enacted into law a mandatory death penalty. We emphasize here that our [present] holding does not in any way purport to rule on the validity of the new statute." State v. Rhodes, supra, note 22, 524 P.2d at 1101.

In its subsequent consideration of petitioner's appeal, the Montana Supreme Court reviewed the 1973 death penalty statute in light of this Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976), and companion cases. It upheld the constitutionality of the statute, noting that "[t]he sentencing procedure . . . requires the individual characteristics of the person convicted be considered," State v. McKenzie I, supra, at 557 P.2d 1030, that "[r]eview of the sentence imposed is provided for," ibid., and that "'jury participation in the sentence' is [not] a necessity for constitutionality," id. at 1031. On remand from this Court's vacation of its previous ruling, the Montana Court reiterated its holding, [22] stating that

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21 / See note 1, supra.

22/ Whereas the Montana Court on petitioner's first appeal purported to review his sentence "to determine whether the sentence was influenced by passion," "whether the evidence supports . . . the statutory aggravating circumstance," and "whether the death

> "Although Montana's statutory scheme is unlike those approved by the United States Supreme Court in Gregg, Proffitt and Jurek, we see no substantive failure of Montana's statutory scheme to comply with constitutional standards."

State v. McKenzie (II), supra at 581 P.2d 1229. That determination and the consequent affirmance of petitioner's death sentences present a number of questions invoking this Court's "obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." Gardner v. Florida, 430 U.S. 349, 357 (1977).

A. The Failure of Montana's 1973 Capital Sentencing Law to Meet the Procedural Requirements of Furman v. Georgia.

Petitioner has plainly been condemned under a capital sentencing procedure that fails to "address the concerns expressed by the Court in Furman," Gregg v. Georgia, supra, 428 U.S. at 180. Montana's 1973 statute consisted simply of a broad mandatory death penalty for five categories of "deliberate homicide" and any "aggravated kidnaping" resulting in the death of the victim, subject to "a humanistic escape valve in the phrase 'unless there are mitigating circumstances.'" Criminal Code Commission Comment to Mont. Rev. Codes Ann. §94-5-105 (1973 supp.). The "humanistic escape valve" is, of course, nothing new or local to Montana: it resurrects an antiquated pre-Furman death-sentencing formula under which the defendant is required to be hanged unless undefined "mitigating circumstances" are found. See, e.g., Winston v. United States, 172 U.S. 303 (1899) (rejecting the "mitigating circumstances" approach as a matter of federal practice). Judicial discretion to impose or not impose the death penalty is not

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22 / (Cont'd.)

sentence is excessive," State v. McKenzie (I), supra, 557 P.2d at 1034, on remand it said "this Court determines the legality of the sentence imposed . . . while the Sentence Review Division is designed to determine the appropriateness of the sentence," State v. McKenzie (II), supra, 581 P.2d at 1229. Petitioner's sentence has not been reviewed by the Sentence Review Division of the Montana Court.

meaningfully circumscribed by such a formula. This Court squarely so held in 1972 when, pursuant to Furman, it vacated death sentences imposed under the laws of at least three States that used the formula.

Tilford v. Page, 408 U.S. 939 (1972) (per curiam) (see, e.g., Jones v. People, 146 Colo. 40, 360 P.2d 686, 692 (1961); Jones v. People, 155 Colo. 148, 393 P.2d 366, 367-368 (1964)); Williams v. Kentucky, 408 U.S. 938 (1972) (per curiam) (see e.g., Edwards v. Commonwealth, 298 Ky. 366, 182 S.W.2d 948, 951 (1944)); Herron v. Tennessee, 408 U.S. 937 (1972) (per curiam) (see Tenn. Code Ann. §39-2406 (1955); e.g., Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843, 848 (1932)).

The 1973 Montana statute "simply papered over the problem of unguided and unchecked . . . discretion" in death sentencing. Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion) by combining the vices of the death-sentencing procedures that this Court found unconstitutional in 1972 and 1976. It first made a mandatory death penalty the presumptive sentence for a broad roster of criminal offenses, see Roberts v. Louisiana, 428 U.S. 325 (1976),[23] and then allows the trial court to impose a lesser sentence in a manner that continues the pre-Furman regime

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23/ "Torture" is undefined in Montana law, but was defined by the Montana Courts below -- by reference to California case law -- as assault "for the purpose of inflicting cruel suffering," "extort anything," "to persuade [the victim] against his or her will, or . . . to satisfy some other untoward propensity." State v. McKenzie (II), supra, 581 P.2d at 1220; see Add. Instr. 34, Ct. File Item 154, Appendix C, infra. The Montana Supreme Court has likened this provision to that of the Georgia law upheld in Gregg v. Georgia which made murders "aggravated" if "outrageously and wantonly vile, horrible and inhuman" involving "depravity of the mind." State v. McKenzie (I), supra, 557 P.2d at 1034. It is at least questionable whether such standards as these used alone can bulwark a system capable "of imposing capital punishment other than by arbitrariness or caprice." See Gregg v. Georgia, supra, 428 U.S. at 201 n. 51 and 202 n. 54.

of "complete judicial discretion," State v. Palen, 120 Mont. 434, 186 P. 2d 223, 224 (1947), unguided and uncontrolled by any standards that would "focus . . . attention on the particularized nature of the crime and the individual defendant," Gregg v. Georgia, supra, 428 U.S. at 206 (plurality opinion).

Simply narrowing slightly the range of capital crimes[24] or substituting standardless judicial discretion for standardless jury discretion in capital sentencing[25] does not meet Eighth Amendment requirements. See People ex rel. Rice v. Cunningham, 61 Ill.2d

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24/ In the aftermath of Furman, this Court and lower courts invalidated discretionary death sentences for crimes much more narrowly defined than those for which petitioner was condemned see, e.g., Duling v. Ohio, 408 U.S. 936 (1972) (see former Ohio Rev. Code Ann. §2910.04 (1953); Ohio Acts 1925, (Vol. CXI, p. 77)); People v. Fitzpatrick, 32 N.Y.2d, 346 N.Y.S.2d 793, N.E.2d 139 (1973); People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E. 2d 1 (1975). See generally, Roberts v. Louisiana, supra, (plurality opinion).

25/ Many discretionary death sentences reversed in the wake of Furman had been imposed by a judge after a bench trial, see, e.g., Cunningham v. Maryland, 408 U.S. 938 (1972) (see Cunningham v. State 247 Md. 404, 231 A.2d 501 (1967)); Pope v. Nebraska, 408 U.S 933 (1972) (see State v. Pope, 186 Neb. 489, 184 N.W.2d 395 (1971); Staton v. Ohio, 408 U.S. 938 (1972) (see State v. Staton, 25 Ohio St.2d 107, 267 N.E.2d 122 (1971)); or upon a guilty plea, see, e.g., Alvarez v. Nebraska, 408 U.S. 937 (1972) (see State v. Alvarez, 185 Neb. 557, 177 N.W.2d 591 (1970)); Menthen v. Oklahoma, 408 U.S. 940 (1972) (see Menthen v. State, 492 P.2d 351 (Okla. Crim. App. (1971)).

In Proffitt v. Florida, supra, 428 U.S. at 253 (plurality opinion), the Court ruled that sentencing judges must be "given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." The argument that "trial judges can be trusted to exercise their discretion in a responsible manner" and need no standards or guidance "is inconsistent with the basis upon which the Florida capital sentencing procedure was upheld" in Proffitt. Gardner v. Florida, supra, 430 U.S. at 360 n. 11. This Court's Eighth Amendment capital punishment decisions "require that the sentencing authority, be it judge or jury, weigh the aggravating and mitigating factors in light of specific and detailed guidelines." Rockwell v. Superior Court, ___Cal.3d__, 134 Cal.Rptr. 650, 556 P.2d 1101, 1112 (1976). And they forbid death sentencing, though "the penalty is limited" to certain crimes, where the sentencing agency has the raw "discretion to decide, case by case, whether that ultimate punishment should be inflicted." People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 802, 300 N.E.2d 139 (1973). Nothing in them validates a system which simply "permits reduction of an otherwise mandatory death penalty only if the sentencing authority finds mitigating circumstances sufficient to warrant mercy." Rockwell v. Superior Court, supra, 556 P.2d at 1112.

353, 336 N.E.2d 1 (1975).[26] The Eighth Amendment requires an "informed, focused, guided and objective inquiry into the question whether [a particular defendant] . . . should be sentenced to death." Proffitt v. Florida, supra, 428 U.S. at 259. The 1973 Montana statute provided none. Petitioner was sentenced to die simply because the judge that sentenced him found that the death penalty was "justified" in his case. Ct.File Item 169; Appendix B, infra at 9. While the judge assigned various reasons for his decisions,[27] neither the aggravating nor the mitigating factors he cited nor the procedure by which he found them, had any statutory basis.[28]

26/ In Cunningham, the Illinois Supreme Court struck down a post-Furman death penalty statute indistinguishable from Montana's primarily on the state constitutional ground that the three-judge sentencing courts it created were unauthorized. But the court made the "additional observation" that the statute -- which provided for the death penalty for certain specified crimes unless "compelling reasons for mercy" were found by the court -- was "defective because it does not contain standards to be considered in determining whether there are 'compelling reasons for mercy' and the imposing of a sentence other than death." 336 N.E.2d at 6. One Justice "concur[red] with the majority that "[t]he 'compelling reasons for mercy' test is too vague and indefinite and permits a degree of arbitrariness in the imposition of the death penalty not permissible under Furman." Id.at 7.

27/ At sentencing, petitioner's counsel protested that the determination of the presence or absence of statutorily undefined "mitigating circumstances" was the kind of amorphous and discretionary standard condemned in Furman, Petition and Motion in Mitigation, Ct. File Item 162, at pp. 1-2. Counsel asserted that they were unable to determine exactly what "matters in mitigation" they could legitimately present, id. at 2-3. The defense did offer several considerations to the court as mitigating factors: petitioner's youth, id. at 3, his deprived and rootless background, ibid.,his "mental disease" or "personality disorder" found by psychiatrists for both the defense and prosecution, ibid., and the court's previous agreement to sentence him to a term of imprisonment upon his guilty plea, id. at 4. The Court's written Findings,Conclusions and Sentence, Ct. File Item 169; Appendix B, infra,discusses primarily nonstatutory factors in aggravation -- the seriousness of the crime, the "dangerousness" of the defendant, and his prior record, id. at 7-8, and the need to keep him from being "turned loose to menace society again," id. at 9.

28/ The post-trial sentencing proceeding that was held in petitioner's case "was not statutorily based." Note, Montana's Death Penalty, 38 Mont. L.Rev. 217, 219 (1977). See State v. McKenzie (II), supra, 581 P.2d 1269-73 (Shea, J., dissenting).The Montana

In different cases under this law other courts may have analyzed aggravation and mitigation in wholly contradictory ways, and pronounced sentences of less than death for indistinguishable crimes--leaving petitioner alone to be struck by the "lightning bolt"[29] of of the trial court's judgment here.[30] Nothing about the statutory and judicial process through which petitioner -- and only petitioner--was selected to die under the former Montana death penalty law meaningfully responded to Furman's mandate that "discretion . . . on a matter so grave as the determination of whether a human life should be taken or spared . . . must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, supra, 428 U.S. at 189. This Court should grant certiorari here because it "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." Ibid., quoting Furman v. Georgia, supra, 408 at 310 (concurring opinion of Mr. Justice Stewart).

28/ (Cont'd.)

court in petitioner's case found them nonetheless authorized and required by "[r]eading . . . provisions together" which required presentence investigations in all felony cases and mandated sentencing in all cases "in accordance with . . . [the] individual characteristics, circumstances, needs and potentialities" of the defendant. State v. McKenzie (II) supra, 581 P.2d at 1229. On their faces these provisions appeared neither to be mandatory nor necessarily applicable to capital crimes. See id. at 1270-1271 (Shea, J., dissenting).

29/ Lockett v. Ohio, __U.S.__, 57 L.Ed.2d 973, 999 (1978)(concurring opinion of Mr. Justice Marshall).

30/ In its initial affirmance of petitioner's sentence the Montana Supreme Court acknowledged that "this case was tried . . . before any set pattern of matters that a jury must consider in death cases" was formed. State v. McKenzie (I),supra, 557 P.2d at 1033. Neither in that decision nor in its later reconsideration of petitioner's case did the Montana Court compare it to any other cases in which death sentences were or were not pronounced.

B. The Total Lack Of Jury Participation In Capital Sentencing.

This Court heretofore has reserved judgment on whether "the Constitution requires that the death sentence be imposed by a jury". Lockett v. Ohio, ___U.S.____, 57 L. Ed.2d 992 n.16. The decision that petitioner be sentenced to death was made solely by the trial judge. This case thus squarely presents that question.

In view of the "awesome finality of a capital case,"[31] American jurisdictions had, prior to Furman v. Georgia, supra, determined with near unanimity that infliction of the death penalty should be put in the hands of the jury rather than the judge. Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." McGautha v. California, 402 U.S. 183, 200 n.11 (1971). See Woodson v. North Carolina, supra, 428 U.S. at 291-292. In the last ten years, only Montana and several other states have reversed this historical evolution by removing the jury altogether from the sentencing process.[32]

31/ Kinsella v. Singleton, 361 U.S. 234, 249, 255 (1960) (dissenting and concurring opinion of Mr. Justice Harlan).

32/ At least one of these States appears to have done so as part of "a direct response to Furman." Lockett v. Ohio, supra at 57 L. Ed.2d 986 n. 7. See Ohio Rev. Code Ann. §29-2522 (1973 spec. supp.); and see Neb. Rev. Stat. §29-2522 (1973 Supp.); Ariz. Rev. Stat. §13-454(A)(1974 Supp.). Only Colorado appears to have elected to place discretionary death sentencing solely in the hands of the trial judge, after the national shift to jury discretion or abolition and before Furman. BOWERS, EXECUTIONS IN AMERICA 8 (1974).

In its 1976 decisions holding that the death penalty could be a constitutionally appropriate punishment for some crimes this Court reaffirmed the desirability of jury input in the capital sentencing process. Gregg v. Georgia, supra, 428 U.S. at 190; Proffitt v. Florida, supra, 428 U.S. at 252.[33] And while it has "never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, supra, 428 U.S. at 252, neither has it considered nor approved a post-Furman death penalty statute which excluded the jury totally from the process of determining sentence.[34] It has approved only one encroachment upon the jury's traditional sentencing power in a capital case: the system whereby a Florida trial judge may impose a death sentence where a jury's recommendation of life imprisonment is clearly unreasonable.[35] See Proffitt v. Florida, supra. This precedent obviously

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33/ See also Witherspoon v. Illinois, 391 U.S. 510, 520 n.15 (1968); McGautha v. California, supra, 402 U.S. at 200 n. 11, 211.

34/ The Court's conjecture that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases," id. at 252, must of course, be taken in the context in which it was issued--as a statement of the probable result of a system in which an advisory jury sentence may be mitigated at the discretion of the trial judge and may be increased only where a life sentence would be clearly unreasonable, id. at 249. Even so, it is not borne out by the record of extensive documentation of widely varying sentencing attitudes and practices among judges. See, e.g., TWENTIETH CENTURY FUND, TASK FORCE ON CRIMINAL SENTENCING, REPORT: FAIR AND CERTAIN PUNISHMENT (1976); VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); FRANKEL, CRIMINAL SENTENCES -- LAW WITHOUT ORDER (1972); HOGARTH, SENTENCING AS A HUMAN PROCESS (1971); Zumwatt, The Anarchy of Sentencing in the Federal Courts, 57 J. AM. JUD. SOC. 96 (1973).

35/ The Court described Florida's sentencing system as follows:

> "The jury's [sentencing] verdict is determined by majority vote, It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So.2d 908, 910 (1975)."

Proffitt v. Florida, supra, 428 U.S. at 248-249 (plurality opinion). In Florida, therefore, there is substantial presumption that the jury's advisory sentence will, in fact, be imposed. See Gardner v. Florida, supra. In Montana, however, the jury plays no role in sentencing whatsoever.

does not resolve the constitutionality of Montana's procedure. The Court should review the question whether Montana's total exclusion of the jury from the capital sentencimg decision is consistent with the "evolving standards of procedural fairness in a civilized society," Gardner v. Florida, supra, 430 U.S. at 357 (plurality opinion), "employed by the State to select persons for the unique and irreversible penalty of death," Woodson v. North Carolina, supra, 428 U.S. at 287 (plurality opinion)(footnote omitted).

Several considerations cast the gravest constitutional doubt upon this procedure:

First, as part of the evolution of capital sentencing practice in this country, see Woodson v. North Carolina, supra, 428 U.S. at 289-299 (plurality opinion), by the middle of the twentieth century, every American jurisdiction electing the death penalty had decided to "take from the judge the onus of inflicting capital punishment," United States v. Jackson, 390 U.S. 570, 576 n.12 (1968); Woodson v. North Carolina, supra, 428 U.S. at 291-292 (plurality opinion) and decided that if a capital "defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." Duncan v. Louisiana, 391 U.S, 145, 156 (1968). See McGautha v. California, supra, 402 U.S, at 200 n.11; McElroy v. United States, 361 U.S. 249, 255 (1960)(dissenting and concurring opinion of Justice Harlan). That determination constitutes " a fundamental decision about the exercise of official power," and reflects "a reluctance to entrust plenary powers over . . . life . . . to one judge or to a group of judges." Duncan v. Louisiana, supra, 391 U.S. at 156.[36] The reversal of that decision by Montana and a few other states is clearly "attributed to diverse readings

36/ See, e.g., Bloom v. Illnois, 391 U.S. 194, 202 (1968);

of this Court's multi-opinioned decision in" Furman, Woodson v. North Carolina, supra, 428 U.S. at 299 (plurality opinion), rather than to a "sudden reversal of societal values regarding the imposition of capital punishment," id. at 298.

Second, jury participation in sentencing has traditionally assured a " 'link between contemporary community values and the penal system,' " Woodson v. North Carolina, supra, 428 U.S, at 295 (plurality opinion), "without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S. 86, 101," Witherspoon v. Illinois, 391 U.S, 510, 520 n.15 (1968). Sentencing juries provided the most "direct source of information reflecting the public's attitude toward capital punishment," Furman v. Georgia, 408 U.S. 238, 430-440 (1972)(dissenting opinion of Mr. Justice Powell); and see Gregg v. Georgia, supra 428 U.S. at 181-192 (plurality opinion); their judgments reveal that "under contemporary standards of decency death is viewed as an inappropriate punishment for substantial portion of convicted first-degree murderers," Woodson v. North Carolina, supra, 428 U.S. at 296 (plurality opinion). Trial judges, on the other hand--because of their education, training and relative insulation--are particularly poor repositories of "contemporary community standards" and have historically been significantly more willing than

36/(cont'd.)

Cadispoti v. Pennsylvania, 418 U.S. 506, 515 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 463-466 (1971); Taylor v. Hayes, 418 U.S. 488, 501-503 (1974). And see Groppi v. Leslie, 404 U.S. 496, 504-506 (1971). When life is at stake, jury sentencing" 'places the real direction of society in the hands of the governed . . . and not in . . .the government,' " Powell, Jury Trial of Crimes, 23 WASH. & LEE L. REV. 1, 5 (1966)(citing DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (Reeve transl. 1948)).

juries to impose the death penalty.[37] The jury and the legislature are the two crucial "indicators of evolving standards of decency respecting the imposition of punishment in our society," Woodson v. North Carolina, supra, 428 U.S, at 293 (plurality opinion), and only the jury is "directly involved," Gregg v. Georgia, supra, 428 U.S, at 181 (plurality opinion), and able to bring those standards tobear on the facts of a particular case.

Its Eighth Amendment judging function is vitally necessary inasmuch as its voice is uniquely "that of the society against which the crime was committed," Williams v. New York, 337 U.S. 241, 253 (1949)(dissenting opinion of Justice Murphy.)

37/ See KALVEN & ZEISEL, THE AMERICAN JURY 436, 306-312 (1966).

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminology, sociologists, penalogists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10)(1968) at 64. See also KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) at 21-40.

Finally, Montana's procedure of holding the mitigation hearing before the trial court deprives a capital defendant of his right to have a jury find facts which determine whether he lives or dies.[38] Constitutional protections apply not only to procedures which determine "guilt or innocence but also . . . [to those which affix] the degree of criminal culpability," Mullaney v. Wilbur, 421 U.S. 684, 697-698 (1974). See Gardner v. Florida, supra. Montana has determined that only some deliberate homicides are to be punished with death. It is the necessity of making new factual findings in aggravation and mitigation[39] which triggers petitioner's rights to a jury determination---at least of these factual questions if not of the ultimate question of punishment---at this second stage of the proceedings. For the Montana death penalty statutes do "not make the commission of a specified crime the basis for sentencing. [They] . . .mak[e] . . . [the] conviction the basis for commencing another proceeding . . . to determine whether a person

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38/ The verdicts returned by the jury found petitioner guilty or "deliberate homicde by means of torture" and "aggravated kidnapping" which had caused the death of the victim. T. 2605. The trial court referred the "aggravating circumstances" to the jury through the "statute was silent as to whether the judge or jury makes the finding of the aggravating circumstances." State v. McKenzie (II), supra, 581 P.2d at 1268, (Shea, J., dissenting); see §94-5-105 and 95-5-304, R.C.M. (1974 Supp.) pp.3-4, supra. The consequences of these verdicts--unless the court found "mitigating circumstances"--would be the execution of petitioner, and its factual determinations were not dispositive with regard to the sentencing issues which the trial judge ultimately resolved. The jury made no findings whether the crimes for which it convicted petitioner were sufficient to justify the death penalty or whether there were countervailing "mitigating circumstances" present, and it had no chance to evaluate the contents of the presentence report and the testimony and argument presented at the mitigation hearing.

39/ Although the trial court's statutory directive was simply to determine whether "mitigating circumstances" existed, the bulk of Judge Nelson's findings in this case concerned the existence of aggravating factors other than the "torture" which the jury had found to accompany the deliberate homicide. See Appendix B, infra.

constitutes a threat of bodily harm to the public" sufficient to justify execution. Specht v. Patterson, 386 U.S. 605, 608 (1967). Not all factors affecting criminal sentencing determinations must be decided by a jury,[40] but Mullaney v. Wilbur, supra, and Gardner v. Florida, supra, stand for the proposition that where the determination of certain factors is of crucial significance--where they "may be of greater importance than the difference between guilt or innocence for many lesser crimes"--the State may not lessen the standards by which those factors must be proved by "characterizing them as factors that bear solely on the extent of punishment." Mullaney v. Wilbur, supra, 421 U.S. at 698.[41] This Court should therefore determine whether petitioner had a constitutional right to a jury's factual evaluation of the propriety of the death penalty before the ultimate penalty was imposed by the trial court.

C. Unreliability of the Factual Predicate of Petitioner's Death Sentence.

This Court has recognized that "[b]ecause of [the]. . . qualitative difference [between the death penalty and a sentence of imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the

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40/ Cf. Specht v. Patterson, supra, and Townsend v. Burke, 334 U.S. 736 (1948), with Williams v. Oklahoma, 358 U.S. 576 (1959); and Williams v. New York, 337 U.S. 241 (1949).

41/ Judge Friendly held in United States v. Kramer, 289 F.2d 909 (CA2 1961), that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the presence of the aggravating circumstances substantially increases the severity of possible sentencing consequences, it must be assumed that "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge." Id. at 921. The aggravating circumstance involved in Kramer (the fact that embezzled commercial paper exceeded $100 in value) raised the crime from a misdemeanor to a felony. Id. at 920. The Kramer principle "is now well recognized." United States v. DeVall, 462 F.2d 137, 142 (CA5 1972).

appropriate punishment in a specific case," Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion) (footnote omitted). Because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action, [i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion." Gardner v. Florida, supra, 430 U.S. at 359 (plurality opinion).

Yet the Montana procedures under which petitioner was sentenced to die include none of the most basic safeguards against errors of fact in criminal trials: notice of the precise issues, procedures for the orderly presentation of evidence, limitations on the scope of evidence to that properly worthy of reliance, or placement of the burden of proof on the State to "reduce the risk of convictions resting on factual error." In re Winship, 397 U.S. 358, 363 (1970). Instead Montana utilized in petitioner's case a procedure which could hardly qualify as constitutional in a petty criminal trial, let alone meet the need "for a greater degree of relianility when the death sentence is imposed," Lockett v. Ohio, supra, at 53 L. Ed. 2d at 989; a procedure with no order to it, but simply a "' Sentence first, verdict afterwards'"[42] bias in favor of death.

The trial judge's deliberation on petitioner's sentence began with a jury's verdict being pronounced and publicized[43] that

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42/ L.CARROLL, ALICE'S ADVENTURES IN WONDERLAND (Collier ed. 1962) at 150.

43/ The Montana procedures utilized here unnecessarily subject a judge to the public pressure attendant upon the reducing of a jury-imposed sentence of death in order to assure the defendant the kind of hearing that is his constitutional right. Such a procedure is tantamount to the beginning of a criminal trial on the issue of guilt by a public proclamation that the defendant is guilty. The pressures upon a trial judge who must appear to overrule the considered decision of twelve citizens who have sat through the trial of a case and rendered a capital verdict constitute too great a threat to the judge's impartiality to be permitted consistently with the Eighth and Fourteenth Amendments. See generally Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. City of Monroeville, 409 U.S. 57 (1972); Connally v. Georgia (U.S., Jan. 10, 1977).

required a death sentence unless the court interceded with a finding of "mitigating circumstances". The judge was given no rules of procedure and no standards by which he was to make his ruling on mitigation. No factual hearings were prescribed or held; the judge simply read submitted reports and relied on his hearing of the evidence at trial. The "debate between adversaries [which] is often essential to the truth-seeking function" Gardner v. Florida, supra, 430 U.S, at 360, was held only after the judge's decision and petitioner's death sentence had been written.

The possibility for error "in the determination that death is the appropriate punishment" under such a process is obvious. That possibility was realized in petitioner's case. The written Findings of the trial court--which ranged over numerous matters quite distinct from the question of "mitigation", see note , supra, --contained two significant factual errors. First, although the trial court submitted to the jury a verdict of "Sexual Intercourse Without Consent: Guilty", Add. Instr. 54, Ct. File Item 154, the jury did not find petitioner guilty of this offense. See T. 2605. But in its "Findings, Conclusions, Sentence and Order," the trial court imposed the death penalty upon petitioner because "[t]he evidence in the case, and as found by the jury discloses a brutal, conscienceless, torture, rape and deliberate killing of a human being," and because "of the rape torture, kidnapping and killing of Lana Harding of which the defendant has been found guilty," Ct. File Item 169, at pp. 7, 8; Appendix B, infra (emphasis added).[44] Second, the trial court asserted that "under existing Montana Statutes the defendant under a 100 year imprisonment sentence would automatically be eligible for parole in 12½ years less good time allowance [and] . . . the 12½ years could and would be cut so that the defendant would only be required to service [sic] approximately seven years of the 100 year sentence he would be turned loose." Id. at 9. This is simply

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44/ The assertion that the evidence "as found by the jury" showed a "deliberate" killing was also inaccurate.

incorrect.[45]

Petitioner's submission here is not that the trial court was forbidden to make a finding of rape even though the jury had not made such a finding,[46] or that the trial judge was forbidden to evaluate the chances of petitioner's being paroled. But in his finding of rape, the trial judge relied on a jury finding which was never in fact made; and in his estimation of petitioner's chances for parole, the trial judge misunderstood the governing law. "When life itself is what hangs in the balance, a fine precision in the process must be insisted upon." Lockett v. Ohio supra, 57 L. Ed.2d at 999-1000 (concurring opinion of Mr. Justice Marshall). This Court should grant certiorari to consider the reliability of the "blunderbuss, virtually mandatory approach to imposition of the death penalty," ibid., used by Montana here. For just as in Gardner v. Florida, supra, it appears probable that petitioner's "death sentence rests on an erroneous factual predicate." 430 U.S. 262.

45/ The trial judge's assertion that petitioner "would be turned loose to menace society" after serving only seven years of a one hundred year sentence is erroneous. Under Mont. Rev. Codes Ann. §95-3214(1)(a)(1973 Supp.), a prisoner is eligible for parole after "he has served at least one-quarter (1/4) of his full term, less good time allowances off, as provided in section 80-1905." Under the latter section, it would be impossible to accumulate more than 12½ years, which would reduce the twenty-five years ("one quarter. . .of his full term") to 12½ years. And of course--contrary to the judge's flat statement--there is no guarantee that a prisoner who is eligible for parole at this point would be granted it.

46/ In affirming petitioner's death sentence, the Montana Supreme Court also relied on the trial judge's erroneous finding of rape, since it cited in support of its affirmance the trial judge's findings "(1) that the murder was committed in the commission of a felony; (2)[that there was] a sexual attack on the victim, and (3) [that] 'it was brutal, conscienceless, torture rape and deliberate killing of a human being." State v. McKenzie, supra, 557 P.2d at 1034.

D. The Constitutional Excessiveness of Capital Punishment.

Petitioner respectfully urges reconsideration of Gregg v. Georgia, 428 U.S. 153, 169 (1976). See Black, Due Process for Death: Jurek v. Texas and Companion Cases, 26 CATH. U. L. REV. 1 (Fall, 1976).

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE MONTANA SUPREME COURT'S REAFFIRMANCE OF THE TRIAL COURT'S INSTRUCTIONS REQUIRING PETITIONER TO DISPROVE THROUGH EVIDENCE OF A "MENTAL DISEASE OR DEFECT" THAT HE HAD A PARTICULAR STATE OF MIND WHICH IS AN ESSENTIAL ELEMENT OF THE CRIMES OF DELIBERATE HOMICIDE AND AGGRAVATED KIDNAPPING CONSTITUTED A PROPER RECONSIDERATION OF PETITIONER'S CASE IN LIGHT OF PATTERSON V. NEW YORK.

The principal crimes with which petitioner was charged were the "deliberate homicide" and "aggravated kidnaping" of Lana Harding. The mental elements of both those crimes under Montana law are two: the acts must be done "purposely" or "knowingly."[47]

47/ "The new code abolished all distinctions between first and second degree murder. Malice aforethought and premeditation are no longer elements of the criminal homicide offense. The intent element of the crime of homicide under present Montana law is merely "purposely, knowingly, or negligently" causing the death of another human being. Section 94-5-101, R.C.M. 1947 . . . Defendant was charged with, and convicted of, deliberate homicide, a criminal homicide committed purposely or knowingly. Section 94-5-102(1)(a), R.C.M. 1947." State v. McKenzie (II), supra, 581 P. 2d at 1231.

"(29) 'Knowingly' --A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as 'knowing' or 'with knowledge' have the same meaning."

"(53) 'Purposely' --A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as 'purpose' and 'with the purpose' have the same meaning."

The critical issue in this case, from its inception, was whether the State or the defense had the burden of proving (or disproving) that petitioner had either[48] "knowingly" or "purposely" killed or kidnapped Lana Harding. This Court remanded this case "to the Supreme Court of Montana for further consideration" of that question in light of Patterson v. New York, 432 U.S. 197 (1976). McKenzie v. Montana, 433 U.S. 905 (1977). On remand, the Montana Court "disagree[d]" with Petitioner's argument that "intent, as an element of the offense, may never be established by the use of presumptions." State v. McKenzie II, supra, at 581 P.2d 1222. It held that, though "an element of the offense may not be presumed merely by proof of the remaining elements,"

> Elements of the offense may still be presumed or inferred, however, from proof of other facts, if the relationship between such proved facts and the facts presumed comports with the due process standards announced in Barnes v. United States, (1973), 412 U.S. 837, 93 S.Ct. 2357, 37 L. Ed. 2d 380.

Ibid. Particularly with regard to Petitioner's asserted psychiatric defense negativing the intent elements of these crimes, it held that

> a defendant must prove by a preponderance of the evidence that he lacked the ability, due to a mental disease or defect, to form that criminal mental state which is defined by statute as an element of the crime with which he is charged.

Id. at 581 P.2d 1233. It found the trial court's instructions "considered as a whole," required petitioner only to raise "a reasonable doubt as to whether [he] suffered from a mental disease or defect which prevented him from forming a purposeful or knowing state of mind," and thus were proper. Id.at 1235

48/ "Proof that the defendant acted both purposely and knowingly is not required. Proof of either of said mental states is sufficient." Prelim. Instr. 22, Ct. File Item 154.

(original emphasis).[49] This Court should grant certiorari to determine whether these holdings comport with the Due Process standards set by Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1976).

At issue here is not the question of whether the State may require a criminal defendant to prove an affirmative defense of insanity. Montana law explicitly recognizes the competence of evidence of "mental disease or defect excluding responsibility" for two quite separate purposes: to establish the "affirmative defense" of insanity, Mont. Rev. Codes Ann. §95-503(a)(1969); and "to prove that [the defendant] . . . did not have a particular state of mind which is an essential element of the offenses charged," Mont.Rev.Codes Ann.§95-503(b)(2)(1969).[50] (95-502, p.41-42).Petitioner

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49/ Alternatively, the Montana Court said:

> We are convinced beyond a reasonable doubt that defendant acted "purposely" or "knowingly" and therefore, even if there was error in the burden of proof, it was harmless.

State v. McKenzie,II, supra, 581 P.2d at 1224. That dictum constituted a plain violation of the settled rule that harmless error should not be determined by "the Court's view of 'overwhelming evidence'" and can be found only where the court can "declare a belief that it [the error] was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 23 (1967); see Harrington v. California , 395 U.S. 250, 259 (1969). The constitutional harmless error standard cannot conceivably be satisfied in this case, where petitioner presented expert psychiatric testimony that he lacked capacity to form the mental states defined as elements of a capital charge, and the trial court's repeated instructions to the jury that those elements could be proved by "Presumptions of Law." See Add. Instr. 31, 33, 35, 37, 38, Ct. File Item 154, were calculated to make petitioner's evidence worthless. Chapman v. California, supra, 386 U.S. at 25.

50/ The dichotomy is explicitly recognized in Mont. Rev. Codes Ann. §95-503(1969), which provides in subsec. (a) that "Mental disease or defect" is an "affirmative defense," and in subsec. (b)(2) that evidence of "mental disease or defect" may be introduced to prove that a defendant "did not have a particular state of mind which is an essential element of the offense charged." Mont. Rev. Codes Ann. §95-505 (a)(1969)provides that the Court may appoint a psychiatrist to examine a defendant either when "the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility" or when there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause."The Montana criminal code requires two separate notices: one is to be

at trial repeatedly attacked the constitutionality of the placement of the burden of proof on him on the second of these questions, and sought a ruling from the trial court "advising and requiring the State . . .that it has the burden of proof, at trial, to prove beyond a reasonable doubt, that defendant had and could have had the requisite state of mind which are [sic] elements of the various crimes charged herein." Motion to Suppress, Ct. File Item 88. This motion was denied, Ct. File Item 90, as were several others to the same effect, T. 1371, 1322, 2208, and the trial court declined petitioner's proposed instructions that would have required the State to prove affirmatively that petitioner had "knowingly" and

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50/(cont'd.)
filed in the event a defendant intends to rely upon "mental disease or defect excluding responsibility" as an affirmative defense, Mont. Rev. Codes Ann. §95-503(b)(1)(1969) and "[t]he defendant shall give similar notice when in a trial on the merits, he intends to rely on a mental disease or defect, to prove that he did not have a particular state of mind which is an essential element of the offense charged," Mont. Rev. Codes Ann. §95-503(2)(1969). The report of the court-appointed psychiatrist is to contain, inter alia, two separate evaluations:

> "When a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the criminal conduct charged.

Mont. Rev. Codes Ann. §95-50 5(c)(4) (1969), and

> "When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged."

Mont. Rev. Codes Ann. §95-505(c)(5)(1969). When the court-appointed psychiatrist is called to testify at trial, he is permitted to testify concerning "the mental condition of the defendant at the time of the commission of the offense charged" and concerning the ability of the defendant "to have a particular state of mind which is an element of the offense charged."Mont.Rev.Codes Ann.§95-507(d)(1969

51/ See, e.g., Notice, Ct. File Item 40; Motion for a Bifurcated Trial, Ct. File Item 134; Motion for Dismissal, Ct. File Item 135; Motion to Require Proof of Ability to Have a Particular Mental State, Ct. File Item 143.

"purposely" committed the crimes with which he was charged.52/

Instead it charged the jury that--though petitioner was presumed innocent and the State was required to prove his guilt beyond a reasonable doubt, Prelim. Instr. 7, Ct. File Item 154, and this burden could be satisfied by "Proof of Mental State by Presumptions." Add. Instr. 33, 34, 35, Ct. File Item 154.53/ On the critical question of purposefulness or intent in causing the death of Lana Harding, the jury was told that if it found petitioner "voluntarily committed an illegal act on Lana Harding, such as assaulting or injuring her, . . .

52/ The trial court declined to give the following instructions submitted by petitioner:

> "In each Count, or part of a Count, requiring proof of'knowingly' or 'purposely', the State must prove that Defendant had the necessary state of mind to have acted, and was capable of acting, either 'knowingly' or 'purposely' beyond a reasonable doubt.
> In each Count, or portion of a Count, requiring such, the State must prove beyond a reasonable doubt, that Defendant had the necessary state of mind to have acted either 'knowingly' or 'purposely.' If you find that you do not believe, beyond a reasonable doubt, that Defendant had, or could have had, such a state of mind you must find him Not Guilty." (Defendant's No. 13, Ct. File Item 153.)
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> "[You must find] that the State has proved beyond a reasonable doubt each essential element of the offense. Two of these elements are the requirements of purposely or knowingly . . . [committing homicide] on which you have already been instructed. In determining whether those requirements have been proved beyond a reasonable doubt you may consider the testimony as to the defendant's abnormal mental condition.
>
> If you find that the State has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty, and you should not consider any possible verdict relating to mental disease or defect excluding responsibility." Defendant's No. 47, Ct. File Item 153.

53/ The trial court's instructions to the jury are copied in full in Appendix C, infra.

the law expressly directs you to reason" from such unlawful act that the defendant acted with an unlawful intent, or purpose;" and if it then found petitioner "voluntarily and unlawfully assaulted or injured Lana Harding, and . . . death would result as the ordinary consequence of such an assault or injury, the law . . . expressly directs you to reason that the defendant intended to cause said death regardless of whether or not he actually had such an intent or purpose." Add. Instr. 33, Ct. File Item 154.[54] Similarly, on the charge of kidnapping, the jury was told that if it found the defendant "without lawful authority, restrained Lana Harding, either by secreting her . . . or by using physical force . . . the law presumes that he acted therein with an unlawful intent, purpose or knowledge, and expressly directs you to so reason." Add. Instr. 35, Ct. File Item 154. It described each of these presumptions as "a rebuttable presumption subject to being controverted and overcome by other evidence," but did not say how much evidence. Ibid. And as to the "particular purposes" which made kidnapping "aggravated" -- intent "to inflict bodily injury" or "to terrorize" or "aid the commission of a felony" -- the jury was told that such purposes "must be proved by inference

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54/ On the additional question of whether the "Deliberate Homicide was done by means of Torture," which the trial court decided to submit to the jury, it instructed that

> "The mental state of purposely assaulting another physically to inflict cruel suffering . . . for a particular purpose [of extortion, persuasion, or satisfaction of 'some untoward propensity'] cannot be proved by using the legal presumptions you have been directed to use in the proof of deliberate homicide, and must be proved by the use of inference alone."

Add. Instr. 34, Ct. File Item 154; see Appendix C, infra.

only without the use of any presumptions of law." Ibid. Consistent with all of this, in its instruction on "Mental Disease or Defect", the court charged that the burden rested on petitioner on the issue of "whether or not he could have had the requisite mental state for the act or acts which you have found he committed." Add. Instr. 53, Ct. File Item 154;[55] Appendix C, infra.

Thus on each of the mental elements underlying the principal crimes with which petitioner was charged,[56] the trial court instructed the jury that once it found the commission of an act that was "voluntary" or "without lawful authority" petitioner was required to "bear the laboring oar", Mullaney v. Wilbur, supra at 421 U.S. 706 (concurring opinion of Mr. Justice Rehnquist) on the elements of "knowingness" or "purposefulness."

55/ Instruction 53 left unclear exactly how onerous this burden was but implied it involved more than raising a "reasonable doubt," which it said was all petitioner had to do on the separate issue of "his responsibility for such conduct." Ibid. The jury was told simply it "must consider whether or not he created a reasonable doubt in your minds as to his mental accountability and reliability for any of the acts you may find he committed, and whether or not he could have had the requisite mental state for the act or acts which you have found he committed." Ibid. None of the other instructions regarding the burden of proof on the elements of the offenses referred to petitioner raising a reasonable doubt. See Appendix C, infra.

56/ The trial court instructions regarding "Proof by Presumptions" of the mental elements of the lesser offenses or "Sexual Intercourse Without Consent" and "Aggravated Assault", Add. Instr. 32, 38, Ct. File Item 154, on which no verdicts were returned, see page 40, supra.

On remand from this Court, the Montana Supreme Court held all this proper. It construed Rev. Code of Montana §95-503(b)(2) as creating a "diminished capacity defense,"[57] an "affirmative defense" by which a defendant could "rebut the presumptions of sanity and capability of forming a purposeful and knowing intent" by proving "'that he did not have a particular state of mind which is an essential element of the offense charged.'" State v. McKenzie (II), supra, 581 P.2d 1233. It specifically held that to establish such a defense,"a defendant must prove by a preponderance of the evidence that he lacked the ability, due to mental disease or defect, to form that criminal mental state which is defined by statute as an element of the crime with which he is charged."Ibid. And it found that, "when considered as a whole," the trial court's instructions required only that petitioner establish "a reasonable doubt as to whether [he] . . . suffered from mental disease or defect which prevented him from forming a purposeful or knowing state of mind with respect to the offense charged," "a more liberal burden of proof than that to which

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57/ The term "diminished capacity" appears nowhere in the laws of Montana, and was used first in this case in the Montana Supreme Court's opinion on remand from this Court. Another defense recognized by Montana law which might equally be termed as going to "diminished capacity" is that provided by §94-5-102(1)(a), R.C.M. 1947, defining as "mitigated deliberate homicide" a crime "which would otherwise be deliberate homicide . . . committed under the influence of extreme mental or emotional distress for which there is reasonable explanation or excuse." Cf. Patterson v. New York, supra, 432 U.S. at 202. Petitioner requested that the jury be charged on this lesser offense (Defs. Prop. Instr. No. 25, Ct. File Item 153), but the trial court refused to do so (T. 2598-2599). The Montana Supreme Court upheld that refusal without discussion, stating only that "there was no . . . evidence" which would support a finding of guilt as to that offense and not of the principal offense of deliberate homicide. State v. McKenzie, (II), supra at 581 P.2d 1224.

defendant was entitled." State v. McKenzie (II), supra at 581 P.2d 1235.

That decision failed to apply properly the principles of Patterson v. New York. The Montana Supreme Court's assumption that Patterson prohibited only presumption of an element of an offense "merely by proof of the remaining elements," State v. McKenzie, (II) supra, 581 P.2d at 1222, ignores Patterson's clear reaffirmation of "the mandate of Winship that [the State] . . . prove beyond a reasonable doubt 'every fact necessary to constitute the crime . . . charged' 397 U.S. at 364." Patterson v. New York, supra, 432 U.S. at 206. Its implicit finding that in petitioner's case elements were not presumed from other elements overlooks the clear instruction of the trial court on the basic mental ingredients of each of the four crimes with which petitioner was charged.[58]

58/ "If you find . . .the defendant . . . voluntarily committed an illegal act . . . the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent, or purpose." Add. Instr. 33, Ct. File Item 154. "If you find . . . the defendant . . . without lawful authority, restrained Lana Harding, either by secreting . . . or by using physical force . . . the law presumes he acted therein with an unlawful intent, purpose or knowledge." Add. Instr. 35, Ct. File Item 154. "[I]f you reason from facts proved . . .that the defendant . . . had sexual intercourse with . . . Lana Harding who was not his wife, and without her consent, you are expressly directed . . . that he did so knowingly." Add. Instr. 37, Ct. File Item 154. "[I]f you reason . . . defendant . . . unlawfully caused Lana Harding bodily injury . . . the law expressly directs you to reason therefrom that he acted with unlawful intent that is purposely.' Add. Instr. 38, Ct. File Item 154. See Appendix C, infra.

Its placid assumption that the instructions could be read "as a whole" to say something other than what they clearly said flouts the stricter standards this Court has set for measuring "the duty of the court to safeguard [criminal defendants'] . . . rights" by correct and clear instructions on burdens of proof." Taylor v. Kentucky, __U.S.__, 56 L.Ed.2d 462, 477 (1978). And its alternative holding that any error here was "harmless" -- even if it were tenable on this record, -- begs the question of whether errors involving the "presumption of innocence . . . a basic component of a fair trial under our system of criminal justice," Estelle v. Williams, 425 U.S. 501, 503 (1976), affect "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, supra, 386 U.S. at 23.[59/]

The Courts' rulings in this case that "a defendant must prove . . he lacked the ability . . . to form that criminal mental state which is defined by statute as an element of the crime" does nothing less than "to shift the burden of proving traditional elements of the criminal offenses to the accused." Patterson v. New York, supra, 432 U.S. at 211 n.12. This Court should grant review here to determine whether it has transgressed the "constitutional limits beyond which the States may not go in in this regard." Id. at 210.

59/ This Court's recent decisions have suggested that instructions violative of the Due Process requirement of proof by the State of criminal offenses beyond a reasonable doubt are per se reversible error, Taylor v. Kentucky, supra, at least on direct review, compare Henderson v. Kibbe, 431 U.S. 145, 154 (1977), and that errors affecting the fairness of trials in which life is at stake may never be classifiable as constitutionally harmless, see Davis v. Georgia, 429 U.S. 122 and 124 (1976)(dissenting opinion of Mr. Justice Rehnquist).

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF THE COURTS BELOW TO ENFORCE A PLEA BARGAINING AGREEMENT BETWEEN PETITIONER, THE STATE, AND THE TRIAL COURT, WHICH PETITIONER'S COUNSEL HAD RELIED UPON IN REVEALING TO THE STATE PRIOR TO TRIAL PETITIONER'S TRIAL STRATEGY AND TACTICS, DEPRIVED PETITIONER OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has recognized the "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely call 'plea bargaining', is an essential component of the administration of justice, Santobello v. New York, 404 U.S. 257, 260 (1971). See also Blackledge v. Allison, 431 U.S. 63, 66 (1977). As a "phase in the process of criminal justice," plea bargaining "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances," Santobello v. New York, supra, 404 U.S. at 262. This case presents an instance where these "safeguards" broke down, and petitioner was prejudiced by unfair plea bargaining practices. Like Blackledge v. Allison, supra, petitioner's case presents a significant question of the fairness of plea bargaining procedures which should be resolved by this Court.

Petitioner was tried, convicted and sentenced to death after the county attorney who prosecuted him and the judge who heard his case had agreed to permit him to plead guilty to deliberate homicide and aggravated assault and to receive a sentence of imprisonment -- and after his counsel, in reliance on that agreement, had revealed to the State the substance of his planned defense.[60/] In a meeting on December 22, 1974, defense counsel,

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60/ The evidence on this matter which appears in the record consists of defense counsel's affidavits and statements to the trial court, and the trial judge's responses. Other than in its unsworn Brief in the Montana Supreme Court -- where it "agree[d] with the basic factual description of the events" given by defense counsel, State v. McKenzie (I), supra, 557 P.2d at 1038, see Brief of the State of Montana v. McKenzie, Mont. Sup. Ct. No. 13011, at pp. 17-21 -- there has never been any response to these claims by counsel for the State of Montana. In its Brief, the State claimed it "was well understood that the prosecution still

County Attorney Nelson, and Special Prosecutor Douglas Anderson agreed that petitioner would plead guilty to two charges (deliberate homicide and aggravated assault) and receive sentences of 50 and 20 years, respectively, on those counts. Affidavit of Barney Reagan, Esq., Ct. File Item 99, at p.2. On December 23, 1974, that agreement was presented to the trial judge, R. J. Nelson, during a three hour meeting in chambers. Id. at 3. Judge Nelson agreed to accept the proposed pleas, after a slight modification in sentence (which was agreed to by all parties). Ibid. The trial court set December 30, 1974, for the entry of guilty pleas pursuant to the agreement. Id. at 4. Also pursuant to that understanding, counsel for both sides held a further meeting on December 23, at which the defense presented to the prosecution the tactics it envisioned using at trial and the weaknesses it saw in the State's case, in order to assist the prosecutors in explaining and justifying the plea agreement to the Sheriff's office, the victim's family and the public.[61] Ibid.

On December 28, 1974, counsel for the State advised defense counsel that they were abrogating the plea agreement because of objections voiced by Ms. Harding's family.[62] Ibid. On December

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60/ (cont'd) considered" Lana Harding's family's approval necessary the day before the meeting with Judge Nelson. Id. at 19. It did not address what representations had been made in the meeting itself. Though it acknowledged that information concerning the defense's trial tactics had been revealed after the meeting, it denied that it had been "requested", and said that it all "was either already known to the prosecution or of no significance to the prosecution's case." Id at pp. 20, 21.

61/ The weaknesses the defense foresaw were due primarily to the manner in which the investigation had been conducted; the defense had concluded that some of the evidence obtained and the evidence collected would be inadmissible at trial. Ibid.

62/ In his Reply Brief in the Montana Supreme Court petitioner's counsel contended that he was told by the prosecutors that Ms. Harding's family did more that "object": her father "threatened to kill the prosecutors if they went through with the bargain." Reply Brief of Appellant, State of Montana v. McKenzie, Mont. Sup. Ct. No. 13011, at p. 12.

30, 1974, the parties nonetheless appeared at the hearing that had been set for entry of the pleas. T. 1-6 (Dec. 30, 1974). Defense counsel advised the court that "the prosecution does not wish to proceed with the agreement and understanding that we reached here, with this court, on the 23rd day of December, 1974" T. 5 (Dec. 30, 1974); and see id. at 3-6, 12-16, and expressed petitioner's willingness "to go ahead with that [December 23] agreement and understanding reached." Ibid. The court responded that "if [the prosecutors] . . . don't want to go through with plea bargaining, I don't suppose they have to," and asked County Attorney Nelson, "Do you want to proceed the way that you agreed with counsel last Monday, the 23rd of December . . . ?" Ibid. The prosecutor responded that he did not. The trial judge denied the defense motion (Ct. File Item 94) that he disqualify himself because of involvement in the bargaining process, T. 24 (Dec. 20, 1974),[63] and ordered the case to trial over continuing defense objection.[64] On the first day of trial, the State was permitted

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63/ The court did permit defense counsel to state for the record what had transpired with regard to the plea agreement, over the prosecutor's objcection that he didn't "feel that we should make references to all of this." T. 14 (Dec. 30, 1974). Defense counsel summarized the plea negotiations and stated that petitioner had agreed to plead guilty in exchange for a sentence of imprisonment, that this arrangement had been accepted by the prosecution and the court (ibid.), and that the defense in reliance on this agreement had informed the prosecution of its trial strategy and tactics and of the weaknesses it perceived in the State's case (id. at 15). The prosecutor did not respond to or contest any of the representations, or those made in defense counsel's affidavit filed later that day. Affidavit of Barney Reagan, Esq., Ct. File Item 99.

64/ On January 3, 1975, a "Motion to Enforce Agreement of December 23, 1974," was filed by the defense, again setting out the facts surrounding the plea agreement, Ct. File Item 104, and this motion was denied that same day, Ct. File Item 105. When, at trial, the State moved to endorse fifty-eight more witnesses -- many of whom were to testify to matters as to which the defense objected, claiming prejudice on account of the abrogated plea agreement, but the objection was overruled. T. 80-96; Ct. File Items 114, 115. Finally, at the close of trial, the defense filed a "petition and Motion in Mitigation," Ct. File Item 163, a Motion for a New Trial, Ct. File Item 163, based, in part, on the same grounds, but this motion was summarily denied by the trial court.

to endorse fifty-eight more witnesses, Ct. File Item 113, many of whom testified to the chain of custody of various evidentiary items. T. 80-81, 88. Petitioner objected to the endorsement of these witnesses on the ground that the State had discovered the need for many of them only after the defense had revealed its intended trial tactics pursuant to the plea agreement, but the objection was overruled. T. 91; Ct. File Item 114.

The Montana Supreme Court affirmed and reaffirmed these trial court rulings. In its first decision, on petitioner's direct appeal, it did so on the theory that the State's "intent to get the reaction of the victim's parents and the sheriff" kept the agreement from becoming final and that Santobello was distinguishable because "[t]here a plea had been entered." State v. McKenzie (I), supra, 557 P.2d at 1038. After remand by this Court, however -- as part of its "reconsider/ation of/ the entire case," State v. McKenzie (II), supra, 581 P.2d at 1210, but without any new material of record before it [65] -- the court recounted what it said was "the State's version" of the plea bargaining process "that throughout the discussions the State consistently took the position that no plea bargain could be entered into without the consent of the victim's family and the Sheriff," [66] and that "any gratuitous information that defense counsel believed they had imparted . . . was either already known to the State or was of no significance . . . . " Id. at

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65/ The State declined to discuss other than the Patterson issues in its argument on remand from this Court. Respondent's Brief on Remand, State v. McKenzie, Mont. Sup. Ct. No. 13011 at 3.

66/ The State's representations on the matter to the Montana court in its opening Brief there were limited to what was "understood" the day before the meeting with Judge Nelson; it never addresses what transpired in the actual plea discussions themselves. See note 60, supra; Brief of the State of Montana v. McKenzie, supra at 19-20.

1214. It then found that "the trial judge accepted the State's version" and said it did "likewise", ibid. -- although that "version" was never placed before the trial court, and the trial court's own language was that the prosecuting attorney had "agreed." See page 47, supra. Finally, the court on rehearing said "any statements of defense counsel concerning weaknesses in the State's case . . . were gratuitous and premature," and since "a trial is not a sporting contest . . . in which the verdict turns on nondisclosure of such matters." Ibid.

In Santobello v. New York, supra, this Court ruled squarely that due process requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled." 404 U.S. at 262. In petitioner's case, no plea was accepted by the trial court, but petitioner nevertheless made a "waiver of [his] constitutional rights" in consideration of the bargain almost as serious as that "implicit in [a guilty] plea." 404 U.S. 268 (concurring and dissenting opinion of Mr. Justice Marshall). By revealing to the prosecution the strategies the defense had planned for trial, petitioner, through his counsel, opened to the State the "privileged area" in which his attorney had analyzed and prepared his case. United States v. Nobles, 422 U.S. 225, 238 (1975). He abandoned his right "to remain silent unless he [chose] to speak in the unfettered exercise of his own will," Malloy v. Hogan, 378 U.S. 1, 8 (1964), and to force the prosecution to "'to shoulder the entire load,'" Miranda v. Arizona, 384 U.S. 436, 460 (1966), "to prove its case without any assistance of any kind from the defendant himself." Williams v. Florida, 399 U.S. 78, 108 (1970) (dissenting opinion of Justice Black).

While a criminal defendant may have no absolute right to have his guilty plea accepted by a court, Lynch v. Overholser, 368 U.S. 705, 719 (1962), surely if a defendant has been prejudiced by fulfilling the conditions precedent to a plea bargain-

ing agreement, and by agreeing to plead guilty with the judge who will preside over a trial in which he is presumed innocent, the prosecutor's subsequent unilateral abrogation of that agreement violates fundamental fairness.[67] The justifications offered for the State's breach of its agreement here provide no adequate basis for departure from Santobello's rule. Whether it was in fact "always [the State's] . . . intent to get the reaction of the victim's parents and the sheriff before . . . [the] bargain would be completed," or whether the prosecutor changed his mind about the bargain because of the vehemence with which those parties objected,[68] the result is the same. It is irrelevant

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67/ The lower federal courts have held that while the binding nature of a plea agreement may be "a matter of state law . . . where . . . there is no showing that the accused was prejudiced in preparing his defense," Sanchell v. Parratt, 530 F.2d 286, 291 n.3 (CA8 1970), where a defendant "to his prejudice, performed his part of the agreement while the Government did not," United States v. Paiva, 294 F. Supp. 742, 747 (DDC 1969), due process requires that the bargain be enforced. See United States v. Carter, 454 F.2d 426 (CA4 1972). See also, e.g., United States v. McClintic, 570 F.2d 685, 692 (CA8 1978)(dictum); Hammers v. State, 550 S.W.2d 432(Ark. 1977); State v. Davis, 188 So.2d 24 (Fla. App. 1966); Butler v. State, 228 So.2d 421 (Fla. App. 1969); State v. Kuchenreuther, 218 S.W.2d 621 (Iowa 1974); State v. Brockman, 277 Md. 687, 357 A.2d 76 (1976); People v. Reagan, 397 Mich. 306, 235 N.W.2d 581 (1975); People v. Shipp, 68 Mich. App. 452, 243 N.W.2d 18 (1976).

68/ See note 60, supra. In other contexts, the Court has warned that a criminal defendant may be deprived of due process by "prejudicial influences outside the courtroom," Shepard v. Florida, 341 U.S. 50, 51 (1951) (concurring opinion of Justice Jackson); cf. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION § 3.9(c) (prop. draft. 1971). In Gregg v. Georgia, supra, the Court emphasized that capital sentencing proceedings should contain safeguards against "passion or prejudice," that "it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts," 428 U.S. at 225 (opinion of Mr. Justice White), and that the prosecutor's decision whether to seek a capital felony conviction "will be the same as those by which the jury will decide the questions of guilt and sentence," ibid.

whether or not there is "proof of bad faith." State v. McKenzie (II), supra, 581 P.2d at 1214. "That the breach of the agreement was inadvertent does not lessen its impact." Santobello v. New York, supra, 404 U.S. at 262..

"Prosecutorial duties affecting the fairness of trials have never been . . . restricted" "to good faith effort." Correale v. United States, 497 F.2d 944, 947 (CA1 1973). The meticulous standards of both promise and performance [required by the Constitution from] . . . prosecutors engaging in plea bargaining," ibid., are not met by permitting the State to back out of a bargain which is relied upon by the defense to its prejudice, merely because the prosecuting attorney may have had a subjective intent to make the bargain conditional. Certiorari should be granted here to consider whether the State gained a fundamentally unfair advantage, see Wardius v. Oregon, 412 U.S. 470 (1973), by abrogating its plea agreement in this capital case,[69] and whether this is a situation where "once a defendant has carried out his part of the bargain the Government must fulfill its part." United States v. Hallam, 472 F.2d 168, 169 (CA9 1973).

69/ A prosecutor's decision to plea bargain in a capital case is "probably the most widely significant choice separating the doomed from those who . . . go to prison." BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974). That observation appears to have held true in Montana: two of the three capital cases that have come to its Supreme Court since 1974 have involved significant questions of fairness in plea bargaining. See State v. Coleman, ___ Mont. ___, 579 P.2d 732, 744 (1978).

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INTRODUCTION AT TRIAL OF EVIDENCE FROM PETITIONER'S DWELLING PLACE AND TRUCK PARKED OUTSIDE HIS DWELLING PLACE PURSUANT TO A SEARCH WARRANT VIOLATED HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES TO BE FREE FROM SEARCHES AND SEIZURES UNDER WARRANTS WHICH ARE NOT BASED ON PROBABLE CAUSE AND WHICH DO NOT "PARTICULARLY DESCRIB[E] THE . . . THINGS TO BE SEIZED"

This case presents for review two important and recurrent Fourth Amendment issues: the circumstances under which probable cause to arrest may furnish probable cause to search a dwelling, and the permissiblity or seizures pursuant to a warrant of undescribed items which are not patently "contraband" or evidence of criminal conduct.

The relevant facts may be quickly limned. At about 6:00 p.m. on January 22, 1974, the day Ms. Lana Harding's disappearance was reported, Pondera County Attorney David Nelson requested Justice of the Peace Robert Wolfe to issue warrants for the arrest of petitioner (on a charge of assault) and for the search of "[t]he residence of [petitioner] and the surrounding curtiledge [sic] area known as the old Frank Jochem residence."[70] The County Attorney presented in support of these

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70/ The Complaint (filed by County Attorney Nelson charging petitioner with assault), the Warrant of Arrest (issued by Justice of the Peace Wolfe for assault), the affidavit of County Attorney Nelson in support of the issuance of a search warrant, the Search Warrant, and the Sheriff's Return on the Search Warrant, all contained in Ct. File Item 76, are reproduced in the dissenting opinion of Judge Shea, State v. McKenzie (II), 581 P.2d at 1240-1243, attached as Appendix A.

requests his own affidavit and the sworn, unrecorded testimony of Deputy Sheriff Jerry Hoover. This affidavit stated that Lana Harding "is missing and may have been the victim of foul play"; that there was evidence of "scuffling" in the teacherage where she resided; that a tennis shoe, a trail "of an object being dragged from the teacherage," and "a woman's watch and blood stains" were found outside the teacherage; that the watch and blood stains were found "in the same area as the pickup truck driven by [petitioner] . . . [which was] observed on the evening of January 21, 1974, at approximately 8:00 to 8:30 o'clock P.M."; that the previous evening petitioner had come to the house of one Dan Pearson who "resides next to the teacherage directly north of the [petitioner's] residence" and had appeared "highly nervous and excited" and had requested Pearson's assistance in getting his truck started; and that Pearson had assisted petitioner to get his truck started, whereupon petitioner drove off in an easterly direction. Ct. File Item 76. Deputy Hoover told the Justice[71] that at the teacherage he had "observed the eyeglasses on the floor in the bedroom and the throw rugs pushed up together against each other, and then the scuff marks on the floor, . . . [and

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71/ Although Deputy Hoover's January 22, 1974, testimony before the Justice of the Peace was not transcribed, he gave a deposition on March 12, 1974, in the presence of counsel for petitioner and the State, which summarized his earlier testimony. This deposition appears in the record below as Ct. File Item 30.

a] tennis shoe being outside on the porch and the drag trail, and the blood on the road and the watch." Ct. File Item 30, at p.6. The deputy, who had interviewed Dan Pearson, also told the Justice of petitioner's appearing at Pearson's house on the previous night ("he [petitioner] had ran a long ways, and . . . he talked very rapidly and seemed awfully nervous," id. at 7), and of Pearson's helping petitioner start his pickup truck "in the approximate location of the blood and watch on the road there." Ibid. Hoover's oral testimony did not differ in any significant respect from the information contained in the Nelson affidavit.[72]

72/ The Montana Supreme Court stated that in support of the issuance of the search warrant "there was sworn testimony by the county attorney and deputy sheriff in addition to the affidavit and the combination thereof established probable cause." State v. McKenzie, (I) supra, 557 P.2d at 1035. The record does not reveal what this "sworn testimony by the county attorney" was, apart from the affidavit filed by County Attorney Nelson. Deposition of Justice of the Peace Robert O. Wolfe, Ct. File Item 30, at p.4. Insofar as the Montana Supreme Court has relied upon unrecorded testimony as a basis for issuing the search warrant, a significant Fourth Amendment question is presented "whether the Constitution requires that, at or before the time a warrant issues, the judicial officer make a permanent record of the evidentiary basis for its issuance." Christofferson v. Washington, 393 U.S. 1090 (1969)(opinion of Mr. Justice Brennan, dissenting from denial of certiorari).

On the basis of this evidence, Justice of the Peace Wolfe issued a warrant for petitioner's arrest on a charge of misdemeanor assault and a search warrant[73] for petitioner's dwelling and pickup truck to seize three described items of petitioner's clothing, five described items of women's clothing, and "any other controband [sic] articles." Ct. File Item 76.

73/ The County Attorney's request for a warrant to search had recited that:

> "the said Affiant, hereby prays for the issuance of a Search Warrant for the search of the said Defendant, DUNCAN MC KENZIE, residence located in the Southwest Quarter Northwest Quarter of Section Nine (9), Township Twenty-nine (29) North, Range Two (2) West, and the surrounding buildings within the curtlidge [sic], and for a search of a 1950 black Dodge pickup driven by the Defendant on the night of January 21, 1974. That the object of the search would be to seize the instruments of the assault of the said LANA HARDING including, but not limited to, the evidence as the whereabouts of the said LANA HARDING, to-wit: a brown long sleeve shirt, jeans and rubber overshoe boots, worn by the Defendant; and black coat, purple sweater, woman's blouse with flower design, woman's pink slacks and woman's red and white striped tennis shoe, and any other controband [sic] articles."

Ct. File Item 76.

The warrant concluded "that there is probable cause to believe that the property described is in or upon the said described real property and 1950 black Dodge pickup." Ibid.

The Sheriff executed these warrants[74] at about 7:30 p.m. that evening. He went to petitioner's residence, told petitioner of Ms. Harding's disappearance, gave petitioner the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), and described the arrest and search warrants while petitioner was standing outside his house. Ct. File Item 30, Deposition of Sheriff Hammermeister at 52-55. He next put petitioner into the patrol car, "served the Search Warrant and then we started searching." Id. at 55. A thorough search of petitioner's pickup and dwelling was conducted by the Sheriff's deputies, and the Sheriff's Return noted the seizure of 10 items of clothing, a "pen and jack knife," "Pubic hairs of Suspect," "head hairs of suspect," and "1. pickup and complete contents." Ct. File Item 76. Of these items, only two (the overshoes and the "blue jean type pants") had been described in the warrant. Two of the undescribed seized items were later introduced at petitioner's trial, with

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74/ Neither the State nor the courts below ever sought to justify the search of petitioner's dwelling and pickup as either a consent search or as a search incident to a lawful arrest. See Brief of the State, State v. McKenzie, Mont. Sup. Ct. No. 13011, at p. 15; Order Denying Motion to Suppress (Dec. 3, 1974), Ct. File Item 90; State v. McKenzie (I), supra, 557 P.2d at 1034-1036. The "plain view" exception is similarly not applicable to the items seized, since without scientific analysis, it was not apparent that these items were evidence. Coolidge v. New Hampshire, 403 U.S.443, 466 (1971).

devastating effect.[75]

A. The Lack of Probable Cause to Search

Assuming that there was probable cause for a warrant to arrest petitioner for assault on January 22, 1974, nothing presented to the issuing magistrate furnished probable cause to search petitioner's dwelling or truck. The Montana Supreme Court's decision that once "'a probability of criminal conduct . . . [is] shown'", State v. McKenzie (II) supra, 581 P.2d at 1211 (emphasis omitted), a warrant for the search of a suspect's dwelling is justified, clearly presents a significant question for review. For nothing indicated that any evidence of Ms. Harding's disappearance was to be found within petitioner's dwelling. The magistrate apparently reasoned that because he found probable cause to believe petitioner assaulted her, there was probable cause to believe that evidence of his

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75/ These two items were a pair of "red wing boots", T. 1062, and a "plaid jacket," T. 2090-2091. The boots were one of the most damning items of evidence which the State introduced, since an expert testified that their soles matched the prints found inside a pair of overshoes, T. 1061-1062, found abandoned near where Ms. Harding's purse was found. These abandoned overshoes had blood and brain tissue on them similar to samples taken from Ms. Harding's body, T. 2140, 2147.

crime would be found in petitioner's dwelling. Such an inference flies in the face of the Fourth Amendment's historic definition of "probable cause" as meaning reasonable grounds to believe that criminally-related objects are in the place to be searched at the time when the search is authorized to be conducted. The facts presented to the magistrate to authorize the issuance of a warrant to search a dwelling "must be facts so closely related in time to the issue of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932). See also Andresen v. Maryland, 427 U.S. 463, 478 n.9 (1977)(dictum). As this Court recently noted in Zurcher v. The Stanford Daily, __U.S.__, 56 L.Ed.2d 525, 537 (1978): "[V]alid warrants to search properly may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities, or evidence of crime is located on the premises." (emphasis added). While "only the probability . . . of criminal activity is the standard of probable cause" for a search warrant, Spinelli v. United States, 393 U.S. 410, 419 (1969), the officers must demonstrate a connection between this criminal activity and "the premises to be searched", Dumera v. United States, 268 U.S. 435, 441 (1928). What must appear is "'reasonable or probable cause' to believe that [the searching officers] . . . will find the instrumentality of a crime or evidence pertaining to a crime" in the search, Dyke v. Taylor Implement Co., 391 U.S. 216, 228 (1968).[76] As this Court has recognized

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76/ See Lowery v. United States, 161 F.2d 30, 33 (CA2 1947):

grounds to arrest do not necessarily provide the basis for a search of the arrestee's house." Vale v. Louisiana, 399 U.S. 30, 40 (1970)(Black, J., dissenting).[77] The Magistrate, the Trial Judge and the Montana Supreme Court here all made "the unsupportable assumption that if there is probable cause to obtain an arrest warrant the same set of facts also supports probable cause to obtain a search warrant." State v. McKenzie, (II), supra, 581 P.2d 1244 (Shea, J., dissenting).

76/(cont'd.)

> "probable cause for the issuance of a search warrant necessarily implies, not simply that there are reasonable grounds to believe that some violation of law exists, but that there is a violation in respect to some property located on some premises or on some person -- each of which can be unmistakably identified, so as to be capable of being particularly described in the warrant, from the information in the affidavit."

77/ See United States v. Lucarz, 430 F.2d 1051, 1055 (CA9 1970):

> "[O]f course it cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence. If that were so, there would be no reason to distinguish search warrants from arrest warrants and cases like Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), would make little sense."

See also United States v. Bailey, 458 F.2d 408 (CA9 1972); United States v. Spearman, 532 F.2d 133 (CA9 1976).

B. The Generality of the Search Warrant

Moreover, even if the search warrant were properly issued, it improperly authorized an unconstitutional general search. The Fourth Amendment's prohibition of warrants not "particularly describing the . . . things to be seized," is directed in "Precise and Clear" language against the "unbridled authority of a general warrant." Stanford v. Texas, 379 U.S. 476, 481 (1965). A more general warrant than that issued in this case can hardly be conceived. The warrant authorized the seizure of "any . . . controband [sic] articles." That language authorized the searching officers to seize whatever they thought might be relevant as evidence. Justice Wolfe stated that the "contraband" catch-all was intended to allow the seizure of any evidence "[t]hat the Sheriff felt was pertinent in his investigation and also pertinent to this specific search" and that it authorized him "to take anything he wanted to take that he thought might be related to this case." Deposition of Justice Wolfe, Ct. File Item 30, at p.17. The Sheriff testified that "the wording [of the warrant] says 'and any other contraband' and I figured that covered what we took in the way of evidence and items that we took." Deposition of Sheriff Hammermeister, Ct. File Item 30, at p.73.[78] The items seized by

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78/ "Q [Defense Counsel] [Could you seize] [a]nything that you wanted to take?
A [Sheriff Hammermeister] Well, if it was relevant to the case.
Q But deemed in your own mind as to whether or not it was relevant?
A Yes.
Q If you thought that the kitchen stove was relevant you would have taken that?
A Yes, if I felt that the stove was -- well, if I felt that I could justify the kitchen stove as relevant to the case, yes.
Q You felt that this would have given you authority to take that, or the radio or TV?
A If it fell into either evidence or contraband.
Q But as you saw it?
A Yes."

Ibid.

the officers were not "contraband" in any meaningful sense of the term:[79] they were simply items of clothing that caught the eye of the searching part. The Sheriff was "not certain what contraband means, but I felt it was evidence." Id. at 68.

79/ The boots and shirt constituted evidence against petitioner only as the result of microscopic analysis of them which showed that the boots had a small trace of blood on them (T. 1035) and that their soles matched prints inside abandoned overshoes which had blood and brain tissue on them. (T. 1062). These abandoned overshoes were not found until the day after the seizure of the boots from petitioner's house. T. 2140. The shirt similarly was found to have a trace of blood on it. T. 1205. Sheriff Hammermeister testified that he seized the boots because he thought they matched "footprints at the teacherage on the northwest corner of the school" and he "just had the strongest feeling about them." Deposition of Sheriff Hammermeister, Ct. File Item 30, at pp. 67-68. He similarly testified that he could not "recall" anything unusual about the jacket. Id. at 69.

What this warrant specifically authorized and what the police here deliberately engaged in and what the Montana Supreme Court explicitly approved of in this case was exactly the kind of "a general, exploratory rummaging in a person's belongings" that was "the specific evil . . . [of] of the 'general warrant' abhorred by the colonists." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)(plurality opinion), see Andreson v. Maryland, supra, 427 U.S. at 480. Whereas the Fourth Amendment requires that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant," Marron v. United States, 275 U.S. 192, 196 (1927), here everything was left to the discretion of the officers to determine on the spot what they decided was "contraband" or "evidence" of the crime of "assault" petitioner had been charged with. Only once, in Andreson v. Maryland, supra, has this Court approved language in a warrant approaching the generality of this, and there it did so only because the warrant included a "lengthy list of specified and particular items, all pertaining to" a specific criminal endeavor, 427 U.S. at 480, which made "it clear from the context" what evidence was and insured the warrant "did not authorize . . . a search for evidence of other crimes . . . ." 427 U.S. 481-482. Here the evidence sought was obviously that of a crime other than "assault," and the "context" of the warrant did not confine the sheriff's search to "specified and particular items" but

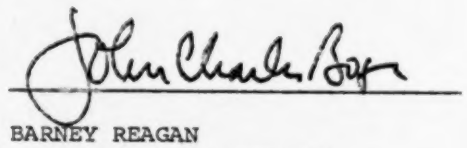
permitted him to range in a general exploration from petitioner's closets to his clothes to the hairs on his body for anything he and the magistrate classed as "contraband". That only two of the thirteen items taken from petitioner's house and person were ultimately used in evidence (see note supra), testifies to the sweeping authority which the warrant gave the sheriff, and which he actually exercised under it. That kind of unbridled search power cannot be sustained so long as this "Court has not done away with the prohibition against general exploratory searches," State v. McKenzie (II), supra, 581 P.2d at 1263 (Shea, J., dissenting), and so long as the principle that "'exploratory searches . . . cannot be undertaken by officers, with or without a warrant'" still stands, ibid., quoting United States v. Rabinowitz, 339 U.S. 56, 70 (1950).

Because "[t]he entire record of this arrest and search and seizure in this case is replete with errors of constitutional dimension," id. at 581 P.2d 1266, this Court should grant certiorari to review it. Under Stone v. Powell, 428 U.S. 465 (1976), no other court will; and petitioner's life will thus be taken on the basis of fundamental Fourth Amendment errors which the Montana Supreme Court has not chosen to correct. See Mincey v. Arizona, __U.S.__, 57 L.Ed.2d 290, 306-308 (1978). (Concurring opinion of Mr. Justice Marshall).

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX A

The Opinion of the Supreme Court of Montana has not been reproduced here but can be found at 581P 2d 1205.

Appendix B:

Findings, Conclusions, Sentence and Order of Hon. R.J. Nelson, District Judge, Ct. File Item 169, State of Montana v. Duncan Peder McKenzie, Jr., Montana Supreme Court Number 13011.

MF20FR5907

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

MF20FR5907

THE STATE OF MONTANA,)
Plaintiff,)
vs.)
DUNCAN PEDER McKENZIE, JR.,)
Defendant.)

Cause No. 6593A

FINDINGS, CONCLUSIONS, SENTENCE AND ORDER

MAR 5 1975

The defendant, Duncan Peder McKenzie, Jr., with his counsel, Barney Regan and Charles L. Jacobson, appeared in open Court this 3rd day of March 1975. The State of Montana appeared by Douglas Anderson, County Attorney, of Pondera County, Montana and David Nelson, who assisted said County Attorney in the prosecution of the action.

The defendant was duly arrested on the 22nd day of January 1974 in Pondera County, Montana, in Connection with the disappearance of Lana Harding. On that day or the day following,counsel Charles L. Jacobson was appointed to represent him by District Judge Ronald McPhillips, and very soon thereafter said Judge appointed counsel Barney Regan to also represent the defendant.

On January 24, 1975 leave was duly granted the State of Montana by said Judge to file an Information charging the defendant with the deliberate homicide of the said Lana Harding. Amended Informations were thereafter duly filed in said cause, and finally pursuant to the decision of the Montana Supreme Court, No. 12797, in cause The State of Montana ex rel Duncan Peder McKenzie,

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Jr., vs. The District Court of the Ninth Judicial District of the State of Montana, in and for the County of Pondera, and the Honorable R. D. McPhillips, Judge in said District, the undersigned who was called in to preside when the Hon. R. D. McPhillips was disqualified by the defendant, on September 30, 1974 duly granted leave to the State of Montana to file the Amended Information, on which trial was had.

Further, on September 30, 1974, because defendant had filed on June 8, 1974 an instrument in which the defendant sought an order of the Court requiring the State of Montana to prove beyond a reasonable doubt, not only that the defendant had the requisite mental states for the offenses then alleged against him, but to also prove that he could have had said mental states and giving notice that he would introduce evidence at the trial of the case to the contrary, the undersigned ordered the defendant, under the provisions of Chapter V, Title 95, RCM to the State Hospital for a psychiatric evaluation, deeming from said notice that the defendant intended to raise the defense of disease or defect of the mind excluding responsibility for criminal conduct provided for by said Chapter V, Title 95, RCM; though defendant specifically denied in said notice that he was relying on the provisions of said chapter and title.

The defendant's counsel objected to said order and in open Court advised defendant he was not to participate in said psychiatric evaluation and was not to answer any questions therein or participate in any tests, and by letter thereafter so advised the State

Hospital.

The defendant on November 12, 1974 was returned to the Court from the State Hospital, with a report that from observation, and without the benefit of testing, they could find no evidence that the defendant suffered from a mental disease or defect and was able to understand the proceedings against him and to assist in his defense.

That on December 3, 1974 the undersigned granted a pending motion of defendant's counsel to change the place of trial from Pondera County Montana, and changed the place of trial to the Eighth Judicial District, Cascade County Montana; and by the order granting said change notified the defendant to be prepared to plead to the charges made in the Information filed September 30, 1974.

That the Information filed September 30, 1974 charged the defendant with the following offenses:

A. Deliberate Homicide;

1. Committed knowingly or purposely, or
2. Committed in the commission of a forcible felony, to wit:
   (a) Kidnapping or,
   (b) Sexual Intercourse Without Consent, or
   (c) Aggravated Assault, or
3. Deliberate Homicide by Means of torture, or
4. Deliberate Homicide by lying in wait or ambush.

B. Aggravated Kidnapping, to wit:

1. Committed for the purpose of inflicting bodily injury on, or to terrorize the victim, or

2. Committed for the purpose of facilitating the commission of a felony, to wit:
   (a) Sexual Intercourse without consent, or
   (b) Aggravated Assault.

C. Sexual Intercourse Without Consent.

D. Aggravated Assault, to wit:
   1. Infliction of serious bodily injury on another, or
   2. Infliction of bodily injury on another with a weapon.

On December 17, 1974 defendant appeared in the above entitled Court with his counsel for the entry of pleas to the said charges. The State of Montana was represented by the aforesaid counsel for the State. The defendant was advsied by his counsel to stand mute, and to refuse to plead and when the Court asked the defendant if this was his desire, he stated yes.

Accordingly the Court thereupon entered a plea of not guilty for the defendant to each of said charges as required by law.

Trial to a jury of said defendant on said charge was duly commenced in the above entitled Court on the 8th day of January, 1975.

On the 21st day of January 1975 the Court permitted the defendant after motion by his counsel to add and enter the affirmative defense of Mental Disease or Defect which excludes Responsibility for criminal conduct, and an examination of defendant was had under Court order by a doctor from the State Hospital, a psychologist and a re-examination by defendant's psychiatrist in

accordance with the provisions of said Chapter V, Title 95, RCM.

On the 31st day of January 1975, evidence having been completed, the Court duly instructed the jury and submitted the case to the jury, less the Charge of Deliberate Homicide by lying in wait or ambush, the Court deeming the evidence insufficient to establish that the defendant had purposely concealed himself and lay in wait for the particular purpose of causing the death of the victim.

On the 1st day of February 1975, the defendant and counsel being present in open court, together with the said counsel for the State of Montana, the jury duly returned its verdicts to the Court, to wit:

1. Guilty of Deliberate Homicide and found said homicide was by means of torture.
2. Guilty of Aggravated Kidnapping and found said aggravated kidnapping resulted in the death of the victim.

Verdicts not being required under the law as to the remaining charges, the verdicts returned were accepted by the Court and were duly read and filed in open Court, and were duly affirmed by the jury in all respects when the jury was duly polled as to each verdict, and each of said findings at the request of defendant's counsel.

The Court then ordered a pre-sentence investigation and set the sentencing date for March 3, 1975 at 2:00 o'clock P. M. in said Court.

The defendant was duly advised as to the purpose

of a presentence investigation and of his right to participate therein if he so chose, and was further advised that the Court would grant him a hearing before sentence was pronounced, if he so desired, as to mitigating facts and circumstances.

The defendant was then remanded to the custody of the Sheriff of Pondera County, Montana, and the jury was discharged.

The presentence investigation report ordered has been received and is placed of record in the above action. It has been duly read and considered by the Court.

On this date, March 3, 1975, the Court heard the following motions made by defendant's Counsel:

Motion for a New Trial and Petition and Motion for Mitigation. The Court duly considered both motions and does hereby deny the same.

The Court then asked defendant if he had any other legal cause to show why sentence should not be pronounced and no sufficient cause being shown or appearing to the Court, the Court makes the following Findings, Conclusions, Judgment and Order:

FINDINGS OF FACT

I. That the charges on which the defendant was found guilty; Deliberate Homicide, which was by means of Torture;and Aggravated Kidnapping which resulted in the death of the victim were a part of the same transaction, and though the defendant is guilty of and could be found guilty of both offenses, under the law, he can be sentenced for only the more serious of the

two offenses.

2. That both of the offenses of which the defendant has been found guilty are of equal gravity and seriousness under the law, both being mandatorily punishable by death, unless there are mitigating circumstances.

3. That there is nothing in the evidence of the case, nor in the presentence investigation, nor in the character, nature, or background of the defendant, nor in any other manner presented to the Court which mitigate his conduct or the sentence required by law.

4. The evidence in the case, and as found by the jury discloses a brutal, conscienceless, torture, rape and deliberate killing of a human being.

5. All of the expert witnesses who testified in the case as to defendant's mental state and condition found the defendant had a personality disorder, classified as anti-social, and that the conduct set forth in paragraph numbered 4 of these Findings is in keeping with such diagnosis. All agreed that the defendant is dangerous and potentially dangerous. The defendant's psychiatrist testified that the defendant knew right from wrong, but despite this ability is unable to avoid committing acts such as were charged against him. The experts that testified for the State of Montana agreed that the defendant was and is potentially dangerous and that he could and can distinguish right from wrong, but testified that he could control his conduct if he chose to do so, though his judgment, because of his anti-social personality is somewhat impaired, and that the defendant

chooses his anti-social, dangerous conduct.

6. That the jury rejected the verdict form finding the defendant not guilty by reason of a mental disease or defect which excludes responsibility for criminal conduct which was submitted to them and correctly found the defendant guilty of deliberate homicide which was by means of torture, and guilty of Aggravated Kidnapping which resulted in the death of the victim.

7. That the presentence investigation discloses that the defendant in Blaine County, Montana in 1970 was convicted of an Aggravated Assault on one Barbara Stifforn who was found brutally beaten, clad only in a blouse crawling alongside of a roadway in said County. On the 29th day of December 1970 he was sentenced to three years in the State Prison for said assault. Early in July of 1971 after serving a few days over six months of his sentence he was paroled as safe to be at large in society. He was returned to the State Prison in December of 1971 after numerous parole violations. In 1972 he was again paroled as being safe to be at large in society. That his parole on the said three year sentence expired in October of 1973 approximately three short months before January 21, 1974, the date of the rape torture, kidnapping and killing of Lana Harding of which the defendant has been found guilty.

8. That the prognosis for change in and rehabilitation of persons with anti-social personality disorders such as defendant's is so unlikely and minimal as to be practically non-existent.

8.

9. That the defendant must never be allowed to be free in and endanger society again. That under existing Montana Statutes on sentencing the maximum sentence other than death is 100 years imprisonment. Under existing Montana Statutes the defendant under a 100 year imprisonment sentence would automatically be eligible for parole in 12 1/2 years less good time allowances. Under existing Montana Statutes regulating good time allowances the 12 1/2 years could and would be cut so that the defendant would only be required to service approximately seven years of the 100 year sentence before he would be turned loose to menace society again, and this would be true even though his sentence was not reduced by the Sentence Review Board or by future executive clemency.

CONCLUSIONS OF LAW

1. The offenses of which the defendant has been found guilty are of equal gravity before the law and result from the same transaction, and therefore only one sentence may be imposed though he was found guilty of two offenses.

2. That there are no circumstances which mitigate the defendant's conduct or the sentence to be imposed.

3. That sentences must be based on prevention and rehabilitation of offenders. That rehabilitation of Duncan Peder McKenzie, Jr. is not possible under existing law and the protection of society and the law requires and justifies the imposition of the death penalty in this case.

9.

MF20FR5916

JUDGMENT AND DECREE

In accordance with the foregoing Findings and Conclusions it is hereby adjudged and decreed:

1. That under the provisions of Section 94-5-105 subsection [illegible] and Section 94-5-304 R.C.M. the death penalty is hereby imposed on the defendant.

2. That under the provisions of Section 95-2303 RCM the defendant Duncan Peder McKenzie, Jr. be hanged by the neck until he is dead, on the 30th day of April 1975 in Pondera County, Montana, by the Sheriff of said County in accordance with the provisions of said Section 95-2303 RCM and as provided by said section.

ORDER

The defendant Duncan Peder McKenzie, Jr., is hereby remanded to the custody of the Sheriff of Pondera County, Montana to carry out the judgment of this Court as provided herein and by said Section 95-2303 RCM.

DATED this 3rd day of March 1975 in open Court.

R. J. Nelson
District Judge

cc:

Appendix C:

Preliminary and Additional Instructions, Ct. File Item 154, State of Montana v. Duncan Peder McKenzie, Jr., Montana Supreme Court Number 13011

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

THE STATE OF MONTANA, Plaintiff, v. DUNCAN PEDER McKENZIE, JR., Defendant.

Criminal Case No. 6584

PRELIMINARY INSTRUCTIONS

FILED
FEB 1 1975
FLORENCE McGIBONE
Court Clerk
DEPUTY

LADIES AND GENTLEMEN OF THE JURY:

The following are preliminary written instructions of the law in this case, and at the conclusion of the trial additional instructions may be necessary, and, if so, they will be given to you. These instructions are given to you at this time to assist you throughout the trial of the case.

1. It is the duty of the Judge to instruct the jury on the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

2. The function of the jury is to try the issues of fact that are presented by the allegations in the information filed in this Court and the defendant's pleas of "Not Guilty". This duty you should perform uninfluenced by passion or prejudice. You must not suffer yourselves to be biased against a defendant because of the fact that he has been arrested for these offenses, or because an information has been filed against him, or because he has been brought before the Court to stand trial. None of these facts is evidence

of his guilt and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

3. By no remark made by the Court during the trial nor by these instructions does the Court express any opinion as to the facts in this case or what verdict you should return.

4. You should take the law in this case from the Court's instructions alone. You should not give any weight to statements of counsel or of anyone else as to what the law is, nor should you allow yourselves to decide this cas contrary to these instructions, even though you might believe that the law ought to be otherwise. Counsel, however, are privileged to comment and argue to the jury upon the law as given in these instructions. If, in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you; neither are you to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all of the instructions as a whole, and are to regard each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance.

5. You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the State and the defendant have a right to demand, and they do demand and expect that you

will conscientiously and dispassionately consider and weigh the evidence and apply the law to the case and that you will reach a just verdict.

6. STATEMENT OF THE CASE

The defendant, DUNCAN PEDER McKENZIE, JR., is accused in the Information filed against him of the following offenses: Deliberate Homicide - two counts; Aggravated Kidnapping - two counts; Sexual Intercourse Without Consent - one count; Aggravated Assault - two counts. The offenses are charged as follows:

"That Duncan Peder McKenzie, Jr. late of the County of Pondera, on or about the 21st day of January, A. D. 1974 at the County of Pondera in the State of Montana, committed the crimes charged in the following counts, all at locations in Pondera County Montana."

COUNT I: That DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, by purposely or knowingly causing the death of LANA HARDING, a human being; in violation of Section 94-5-101 and Section 94-5-102 R.C.M. 1947.

COUNT II: That DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, by purposely or knowingly causing the death of LANA HARDING, a human being, while the said DUNCAN PEDER McKENZIE, JR. was engaged in the commission of, or in an attempt to commit, or flight after committing or attempting to commit:

1. SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, by knowingly having sexual intercourse with the said LANA HARDING, a female not his spouse, without consent, the said DUNCAN PEDER McKENZIE, JR. being a male person; or
2. AGGRAVATED ASSAULT, a felony involving the use or threat of physical force or violence against the said LANA HARDING, by purposely or knowingly causing:

a. Serious bodily injury to the said LANA HARDING; or

(b) bodily injury to the said LANA HARDING with a weapon, namely:

(1) a rope, by placing said rope around the neck of the said LANA HARDING; or

(2) a heavy object, by striking the said LANA HARDING upon her head with said heavy object; or

that the said DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, as above alleged, by purposely or knowingly causing the death of the said LANA HARDING:

1. by mean of torture; or

2. by lying in wait or ambush;

in violation of Section 94-5-101, 94-5-102, 94-5-503 and 94-5-202, R.C.M. 1947.

COUNT 3: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED KIDNAPPING, a felony, by knowingly or purposely and without lawful authority restraining LANA HARDING by either secreting or holding the said LANA HARDING in a place of isolation, or by using or threatening to use physical force with the purpose of facilitating the commission, or flight thereafter, of the felony:

1. SEXUAL INTERCOURSE WITHOUT CONSENT by knowingly having sexual intercourse with the said LANA HARDING a female not his spouse, without consent, the said DUNCAN PEDER McKENZIE, JR. being a male person; or

2. AGGRAVATED ASSAULT, by purposely or knowingly causing:

(a) serious bodily injury to the said LANA HARDING; or

(b) bodily injury to the said LANA HARDING with a weapon, namely:

1. a rope, by placing said rope around the neck of the said LANA HARDING: or

2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object;

in violation of Sections 94-5-303, 94-5-503 and 94-5-202, R.C.M. 1947, the said LANA HARDING having died as a result of said criminal conduct.

COUNT 4: That DUNCAN PEDER McKINZIE, JR. committed the crime of AGGRAVATED KIDNAPPING, a felony, by knowingly or purposely and without lawful authority restraining LANA HARDING by either secreting or holding the said LANA HARDING in a place of isolation, or by using or threatening to use physical force, with the purpose of inflicting bodily injury on the said LANA HARDING or terrorizing the said LANA HARDING, in violation of Section 94-5-303, R.C.M. 1947, the said LANA HARDING having died as a result of said criminal conduct.

COUNT 5: That DUNCAN PEDER McKINZIE, JR., a male person committed the crime of SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, by knowingly having sexual intercourse with LANA HARDING, a female not his spouse, without consent, in violation of Section 94-5-503, R.C.M. 1947.

COUNT 6: That DUNCAN PEDER McKENZIE, JR., committed the crime of AGGRAVATED ASSAULT, a felony, by purposely or knowingly causing serious bodily injury to LANA HARDING, in violation of Section 94-5-202 R.C.M. 1947.

COUNT 7: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED ASSAULT, a felony, by purposely or knowingly causing bodily injury to LANA HARDING with a weapon, namely

1. a rope, by placing said rope around the neck of the said LANA HARDING: or

2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object;

in violation of Section 94-5-202, R.C.M. 1947

Although the Defendant is charged with two counts in each of the offenses of Deliberate Homicide, Aggravated Kidnapping and Aggravated Assault, only one offense of Deliberate Homicide and one offense of Aggravated Kidnapping and one offense of Aggravated Assault are involved in this case. Leave was granted the State of Montana to charge in this manner, and to also charge the offense of Sexual Intercourse Without Consent, in order to meet the problems in proof that arise when an offense or offenses can be committed in different ways, or by different means, or for different purposes.

The Defendant can be convicted or acquitted on any or all of said offenses as you may find the allegations in each of said counts proved or not proved, but in no event may be sentenced for more than one offense of Deliberate Homicide and more than one offense of Aggravated Kidnapping and more than one offense of Aggravated Assault even though you may find both of the counts with which he is charged in each of said offenses to have been proved beyond a reasonable doubt.

Sentencing, if any, will depend upon the verdict or verdicts which you may return, and under Montana law the matter of sentencing is vested solely in the Court so you are not to concern yourselves therewith.

In arriving at your verdict or verdicts in this case, the subject of penalties or possible punishment is not to be discussed or considered by you and must not in any way be allowed to affect your decisions as to the innocence or guilt of the defendant of the offenses charged.

To each of the seven counts contained in the Information the Court, under the law of this State, ordered a plea of "Not Guilty" to be entered on behalf of the defendant, when under his legal right he stood mute and refused to plead to the counts contained in the Information. Under such pleas of "Not Guilty" every material allegation contained in each of said seven counts is denied.

In order to convict the defendant of the offense charged in any of said counts all of the material allegations contained in that particular count must be proved beyond a reasonable doubt. All of the allegations contained in each Count are material to the charge contained in that count.

7. PRESUMPTION OF INNOCENCE - DEFINITION OF REASONABLE DOUBT

You are instructed that a defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. The effect of this presumption places upon the State the burden of proving the defendant guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows:

It is not a mere possible doubt, because everything relating to human affairs and depending upon evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral

certainty of the truth of the charge.

8. MAY NOT CONVICT ON CONJECTURE OR SURMISE

A person may not be convicted on possibilities or on mere conjecture or surmises, however shrewd, but only on evidence establishing his guilt beyond a reasonable doubt; that is, on evidence which establishes an abiding conviction to a moral certainty of the truth of the charge.

9. EXCLUDING ALL POSSIBILITY OF ERROR AND PROOF TO ABSOLUTE CERTAINTY NOT REQUIRED

You are instructed that the law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty for such degree of proof is rarely possible. That degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it; that is, to a moral certainty of the truth of the charge, no more and no less.

10. Purposely Defined:

A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

11. KNOWINGLY Defined:

A person acts knowingly with respect to conduct or

to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

12. Intent Defined:

Intent is a state of the mind importing conscious purpose, aim or decision.

13. Felony Defined:

"Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding one (1) year.

14. Forcible Felony Defined:

"Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

15. Threat Defined:

"Threat means a menace, however communicated to:

(a) inflict physical harm on the person threatendd or any other person or on property; or

(b) subject any person to physical confinement or restraint; or

(c) commit any criminal offense.

16. Acts Defined:

"Acts" has its usual and ordinary grammatical meaning and includes any bodily movement, any form of communication, and where relevant, includes a failure or omission to take action.

17. Voluntary Act Defined:

A "voluntary act" is any act that is the product of the effort or determination of the actor, either conscious or habitual.

18. Bodily Injury Defined:

"Bodily injury" means physical pain, illness or any impairment of physical condition and includes mental illness or impairment.

19. Serious Bodily Injury Defined:

"Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function or process of any bodily member or organ and includes serious mental illness or impairment.

20. Sexual Intercourse Defined:

"Sexual intercourse" means penetration of the vulva, anus or mouth of one person by the penis of another person, or penetration of the vulva or anus of one person by any body member of another person or penetration of the vulva, or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.

21. Human Being Defined:

"Human being" means a person who has been born and is alive.

Deliberate Homicide Defined:

In this case, insofar as we are concerned with the offense of deliberate homicide, you are instructed:

Deliberate homicide is one kind of criminal homicide. Homicide is deliberate homicide if:

(a) it is committed either purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, or an attempt to commit kidnapping, or any other felony which involves the use or threat of physical force or violence against the individual.

Proof that the defendant acted both purposely and knowingly is not required. Proof of either of said mental states is sufficient. 23.

Deliberate Homicide By Means of Torture Defined:

Deliberate Homicide by Means of Torture insofar as we are concerned with the definition thereof in this case is:

Whoever purposely assaults another physically for the purpose of inflicting cruel suffering upon the person so assaulted for the particular purpose of enabling the assailant to either:

(a) extort anything from such person;

(b) or to persuade such person against his or her will, or

(c) to satisfy some other untoward propensity of the assailant,

and in so doing the assailant causes the death of the person he assails, in the law is guilty of the offense of Deliberate Homicide by Means of Torture, whether or not it was the purpose or intention of the assailant to cause such death.

"Untoward Propensity" means any perverse, wrong, bad or corrupt inclination or tendency.

24.

Deliberate Homicide by Means of Lying in Wait or Ambush Defined:

Deliberate Homicide by means of lying in Wait or Ambush, insofar as we are concerned with the definition thereof in this case is:

Whoever conceals himself, and watches and waits for another with the particular purpose of taking such person unawares, and killing him, and he does kill him is Guilty of Deliberate Homicide by means of lying in wait or ambush

25.

Kidnapping and Aggravated Kidnapping Defined.

Insofar as we are concerned with the offense of Kidnapping in this case you are instructed:

Kidnapping:

A person commits the offense of kidnapping if he either knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by either using or threatening to use physical force to hold said person.

Aggravated Kidnapping:

A person commits the offense of aggravated kidnapping if he either knowingly or purposely restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force to hold said person for any of the followin particular purposes:

(a) to facilitate the commission of any felony, o

(b) to inflict bodily injury on the victim, or

(c) to terrorize the victim.

26.

Sexual Intercourse Without Consent Defined.

A male person who knowingly has sexual intercourse without consent, with a female, not his spouse, commits the offense of sexual intercourse without consent.

"Without Consent" means the victim is compelled to submit by force, or by threat of imminent death, bodily injury or kidnapping, or that the victim is incapable of consent because she is physically helpless.

"Physically helpless" means that a person is unconscious or otherwise physically unable to communicate an unwillingness to act.

27.

Aggravated Assault Defined.

A person commits the offense of Aggravated Assault if he either purposely or knowingly causes either:

(a) Serious bodily injury to another, or
(b) Bodily injury to another with a seapon.

"Weapon" means any instrument or article, or substance which, regardless of its primary function, is reaily capable of being used to produce death or serious bodily injury.

28.

Court Admonition to Jury.

It is your duty not to converse among yourselves or with anyone else, or to suffer yourselves to be addressed by any person on any subject connected with this trial, or to form or express any opinion thereon until the case is finally submitted to you. If anyone should attempt to talk to you about the case, you will advise them that you have been selected as a juror in the case and that you are not permitted to talk about it. If they continue to talk to you, it will be your duty to immediately report the same to the Court.

Instruction Number one hundred one through twenty-eight given and read to jury 1975
R. J. Nelson, Judge

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

* * * * * * * * * * *

THE STATE OF MONTANA,
Plaintiff,
vs.
DUNCAN PEDER McKENZIE, JR.,
Defendant.

Criminal Case No. 6593-A

ADDITIONAL INSTRUCTIONS

* * * * * * * * * * *

FEB 1975
FLORENCE McBONE
Clerk of Court

LADIES AND GENTLEMEN OF THE JURY:

NO. 29

Requirement of Voluntary Act With a Mental State.

A person to be guilty of any of the offenses charged in any of the seven counts charged in the Information must have committed the act or acts charged voluntarily, while having with regard to each element contained in the law defining the offense one of the mental states contained in the said definition.

I.

The offense of Deliberate Homicide requires that the voluntary act (the Killing) have been committed by the defendant either knowingly or purposely or that it was committed in the commission of a forcible felony.

II.

The offense of Deliberate Homicide by Means of Torture requires that the voluntary act (the physical infliction of cruel suffering) be done purposely and in addition thereto that it was done for the particular purpose of enabling the assailant either.

(a) to extort something from the person assailed; or,

(b) to persuade the assailed against his or her will; or

(c) to satisfy some other untoward propensity of the assailant.

III.

The Offense of Deliberate Homicide While Lying in Wait or Ambush requires that the voluntary act (the killing) be done purposely by the defendant who concealed himself and watched and waited for the victim with the particular purpose of causing the death of the victim.

IV.

The Offense of Kidnapping requires that the voluntary act (the secreting or holding of a victim in a place of isolation without lawful authority, or the holding of said person by physical force or threats thereof) be done either knowingly or purposely.

V.

The Offense of Aggravated Kidnapping requires that the voluntary act (the secreting or holding the victim without lawful authority in a place of isolation, or the holding of said person by physical force or threats thereof), be done either knowingly or purposely, and in addition thereto that it be done for one of the following particular purposes: either

(a) to facilitate the commission of any felony (in this case sexual intercourse without consent of the victim, or an aggravated assault upon the victim), or

(b) to inflict bodily injury on the victim, or

(c) to terrorize the victim.

VI.

The Offense of Sexual Intercourse Without Consent requires that the voluntary act (sexual intercourse without consent) be done knowingly.

VII.

The Offense of Aggravated Assault requires that the voluntary act (the infliction of serious bodily injury either with or without a weapon, or the infliction of bodily injury with a weapon) be done either knowingly or purposely.

NO. 30

Mental State - Knowledge or Purpose - How Manifested.

The knowledge or purpose with which an act is done is manifested by the circumstance connected with the offense and the sound mind of the accused. All persons are of sound mind who are not insane.

Upon the trial of the issues raised by the pleas of "Not Guilty" to the charges made in the Information, the defendant is presumed to have been sane at the time the offenses are alleged to have been committed and to be sane now.

NO. 31

Mental State - Methods of Proof

The knowledge or purpose with which an act is committed being a mental state, is incapable of being proved by direct evidence, and proof thereof is permitted by indirect or circumstantial evidence, which means proof by rules of law, denominated inferences and presumptions.

In considering the question of mental state (either knowledge or purpose) it is necessary that you understand the difference between direct and indirect or circumstantial evidence and the legal distinction between inferences and presumptions, so that you use and apply the correct rule in evaluating the evidence, and in your determination of the questions of knowledge or purpose.

Direct evidence is evidence obtained through the use of any of the five senses, and which proves the fact in question without the use of either inferences or presumptions.

Direct evidence, if found to be true, is conclusive proof of the facts testified to.

Indirect evidence, also known as circ umstantial evidence, does not prove the fact in question directly. Rather the fact in question is deduced, that is reasoned, from a proved fact, or facts. Indirect evidence is of two kinds; namely presumptions and inferences.

A presumption is a deduction or reasoning which the law expressly directs a jury make from proved fact or facts; while an inference is a deduction or reasoning which the law permits or allows the jury to draw from the fact or facts proved.

Presumptions expressly direct you to reason from proved facts.

Inferences permit you to reason from proved facts.

It is not necessary that facts be proved by direct evidence. They may be proved also by indirect evidence or by a combination of both direct and indirect evidence. Both direct evidence and indirect evidence are acceptable

as a means of proof. Neither is entitled to any greater weight than the other.

By way of example only, and to illustrate the difference between direct and indirect evidence and the difference between inferences and presumptions of law, you are instructed:

I.

Proof by Direct Evidence (Testimony obtained through the use of any of the five senses, and which prove the fact in question without the use of either inferences or presumptions and which, if found true, conclusively prove such fact):

The witness actually saw "A" pick up a board and hit "B" over the head with it knocking "B" to the ground with a bleeding head. He testified only as to what he saw: "A" picking up the board, hitting "B" over the head with it and "B" being knocked to the ground with a bleeding head. If the jury believes the witness it conclusively proves without the use of inference or presumption only that "A" picked up a board and struck "B" over the head with it and "B" was injured thereby. "A's" mental state -- did he hit "B" over the head knowingly and purposely to injure "B" -- has to be reasoned from the fact "A" picked up the board and from the manner and way he used it in striking "B", and from any other facts and circumstances proved in connection with the matter, that is proved by indirect or circumstantial evidence (inference or presumption).

II.

Proof by Indirect or Circumstantial Evidence.

(Deduction or reasoning which the jury makes from facts proved):

1. Proof by Inference (Deduction which the reason of the jury makes from facts proved without an express direction of the law to that effect).

The witness heard a cry for help, he immediately looked out of the window and saw only two men: "A" holding a board, was standing over the bod of "B" who was unconscious on the ground bleeding from a wound in his head. He did not see "A" strike "B" and testified only as to what he saw and heard. Other evidence was introduced to show that the board then held by "A" had blood on it which was the same type as "B's" blood, and that "A" had a motive for striking "B" and had made threats against "B".

If the jury believes the witness and the other evidence which was introduced they are permitted to deduce; that is, reason therefrom that "A" struck "B" with the board and that he did so intentionally; that is knowingly or purposely.

2. Proof by Presumption of Law (Deductions which the law expressly directs to be made from particular facts):

The witness heard a cry for help. He immediately looked out of a window and saw only two men; "A" holding a board and standing over the body of "B" who was unconscious on the ground and with his head bleeding. Other evidence was introduced to show that the board then held by "A" had blood on it which was the same type as "B's" blood and evidence was introduced that "B" had been struck on the head three times by the board to show that

the striking was not accidental. No evidence was introduced as to a motive for "A's" striking "B" and no evidence of threats by "A" against "B" was introduced.

If the jury believes the witness and the other evidence introduced they are permitted to deduce or reason that "A" struck "B" over the head with the board intentionally and for the purpose of injuring him but in addition thereto the law presumes, that is, the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary act.

Having found that "A" struck "B" over the head with a board three times, intentionally (absent any evidence that the act was in self defense by "A"), "A's" act was unlawful and the jury is expressly directed to reason that "A" struck "B" with an unlawful intent; that is, knowingly or purposely and is further expressly directed to reason that he intended to inflict the injuries that ordinarily result from such an act.

There are other legal presumptions besides those referred to in the foregoing illustration and you will be instructed with particularity as to the use of inferences and presumptions as they may have application to each Count with which the defendant is charged.

Further, unless you are otherwise instructed with regard to a particular presumption, all presumptions are rebuttable; that is, they may be controverted and overcome by other evidence.

NO. 32

Particular Purpose Never to Be Presumed.

In offenses which require proof of a particular purpose the particular purpose required may never be proved by means of legal presumptions, but must be proved by means of inferences only. In this case the offenses of: Deliberate Homicide by Means of Torture, ~~Deliberate Homicide by Lying in Wait or Ambush~~ and Aggravated Kidnapping all require proof that the defendant committed the particular act charged for a particular purpose, in addition to proof that he committed said act either knowingly or purposely.

NO. 33

Method of Proof Applicable to the Offense of Deliberate Homicide

The mental state accompanying the voluntary act required for the offense of deliberate homicide being either knowingly or purposely and not requiring in addition thereto that the act be committed for a particular purpose, proof of the mental state may be made by the use of either inferences or presumptions, or by the use of both inferences and presumptions.

I. Proof of Mental State by Inference.

If you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, in the commission of a voluntary act, caused the death of Lana Harding, you are permitted from that fact alone to deduce or reason that he did so either knowingly or purposely, if no circumstances of mitigation, excuse or justification appear in

the evidence.

You will be instructed on mitigation, excuse and justification if such instructions are needed.

In addition to the fact of death being voluntarily caused by the accused, you may, and are instructed to also consider all of the facts and circumstances connected with said death, that have been proved in the evidence in determining whether or not the defendant acted either knowingly or purposely.

II. Proof of Mental State by Presumptions.

(1) If you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, voluntarily committed an illegal act on Lana Harding, such as assaulting or injuring her, the law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent or purpose.

This is a rebuttable presumption, which means it may be controverted and overcome by other evidence, but whether or not a presumption, once it has come into effect is overcome, is for the jury to determine.

(2) The law also presumes that a person intends the ordinary consequence of his voluntary act.

Therefore, if you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, voluntarily and unlawfully assaulted or injured Lana Harding, and if you further find beyond a reasonable doubt that the death would result as the ordinary consequence of such an assault or injury, the

law presumes that, and expressly directs you to reason therefrom that the defendant intended to cause said death regardless of whether or not he actually had such an intent or purpose.

This also is a rebuttable presumption capable of being controverted and overcome, but once it has come into effect it is for the jury to determine whether or not it has been rebutted.

III. Proof of Deliberate Homicide by Commission Of a Forcible Felony.

Under subdivision (b) in the definition of deliberate homicide you have been instructed a homicide is deliberate homicide if it is committed while the offender is engaged in the commission of, or an attempt to commit sexual intercourse without consent, kidnapping or any other felony which involves the threat of any physical force or violence against any individual.

Sexual Intercourse without consent, Kidnapping and Aggravated Kidnapping and Aggravated Assault have been defined for you. All of these offenses are felonies which involve the threat of physical force or violence against an individual.

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, while engaged in: - - - - the offense of Sexual intercourse without consent, or in the offense of kidnapping, or in the offense of aggravated kidnapping, or in the offense of aggravated assault, ---- caused the death of Lana Harding, the law has declared that he has committed the offense of

deliberate homicide, regardless of whether or not it was his purpose or intent to cause such death.

NO. 74

Methods of Proof Applicable to Deliberate Homicide by Means of Torture

The mental state of purposely assaulting another physically to inflict cruel suffering upon that person for a particular purpose cannot be proved by using the legal presumptions you have been directed to use in the proof of deliberate homicide, and must be proved by the use of inferences alone.

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, purposely assaulted Lana Harding physically and inflicted cruel suffering upon her and in so doing caused her death, you are permitted to infer, that is, deduce or reason from the facts and circumstances which are proved in connection therewith, that he did so for one or more of the particular purposes charged; either,

(a) to extort something from her, or

(b) to persuade her to do something against her will, or

(c) to satisfy some other untoward propensity of the defendant.

And if you find one or more of said particular purposes to have been proved beyond a reasonable doubt and that the defendant killed her while purposely so inflicting cruel suffering upon her, he has committed the offense of

Deliberate Homicide by means of Torture, whether it was or was not his purpose or intention to kill her.

NO. _____

Method of Proof Applicable to Deliberate Homicide by Lying in Wait Or Ambush

The mental state of purposely secreting oneself and watching and waiting for a person with the particular purpose of killing that person is a particular purpose offense and cannot be proved by the use of the legal presumptions that you have been instructed to use in the proof of Deliberate Homicide, and must be proved by the use of inferences alone.

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, purposely secreted himself and watched and waited for Lana Harding and then killed her, you are permitted to infer, that is; deduce or reason therefrom and from all of the facts and circumstances proved in connection therewith that it was his particular purpose to kill her, and to find beyond a reasonable doubt that the defendant committed the offense as charged.

NO. 35

Method of Proof Applicable - Kidnapping

The offense of kidnapping is a lesser offense included in the charges of Aggravated Kidnapping made in Counts 3 and 4 of the Information.

The charge of kidnapping requires that the defendant

need only to have either knowingly or purposely, without unlawful authority, restrained Lana Harding by secreting or holding her in a place of isolation, or by using or threatening to use physical force to hold her.

It does not require, as does the offense of Aggravated Kidnapping, that the defendant have had in addition to such unlawful restraing a particular purpose in mind, such as the purpose to commit sexual intercourse without her consent, or to inflict bodily injury on her, or to terrorize her.

Therefore, the mental state of either knowingly or purposely restraining Lana Harding may be proved by way of inferences or presumptions of law or by the use of both inferences and presumptions of law.

I. Proof by Inference

If you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, without lawful authority, voluntarily restrained Lana Harding, either by secreting her in a place of isolation, or by using physical force, or by threatening to use physical force to hold her, you are permitted to reason therefrom and from all other facts and circumstances connected therewith that he did so either knowingly or purposely.

II. Proof by Presumption

If you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, without lawful authority, restrained Lana Harding, either by secreting her in a place of isolation, or by using physical force, or by threatening

to use physical force to hold her, the law presumes that he acted therein with an unlawful intent, purpose or knowledge, and expressly directs you to so reason.

This presumption in law that an unlawful act was done with an unlawful intent is as you have heretofore been instructed, a rebuttable presumption subject to being controverted and overcome by other evidence as you may find the evidence to be.

NO. 36

Method of Proof - Aggravated Kidnapping

The offense of Aggravated Kidnapping, in addition to the proof required to prove the offense of kidnapping, requires proof that the kidnapping was committed for a particular purpose.

In this case Count 4 requires proof that the Kidnapping was for a particular purpose either to inflict bodily injury on Lana Harding, or to terrorize her and Count 3 requires that the kidnapping have been for the particular purpose of facilitating the commission of a felony: either sexual intercourse with Lana Harding without her consent, or to commit an Aggravated Assault on her.

Therefore, if you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, did kidnap Lana Harding, before he can be found guilty of the offense of aggravated kidnapping as charged in the Information, you must further find beyond a reasonable doubt that he acted while having at least one of the particular purposes charged.

Since a particular purpose may never be presumed in law, the mental state of either knowingly or purposely secreting or holding for a particular purpose must be proved by inference only without the use of any presumptions of law.

This means if you find beyond a reasonable doubt that the defendant did kidnap Lana Harding, you are permitted to deduce or reason from any and all facts and circumstances proved in connection therewith that he did so with one or more of the particular purposes charged in Counts 3 and 4, and to find beyond a reasonable doubt that he committed the offense as charged.

NO. 37

Methods of Proof Applicable to Sexual Intercourse Without Consent.

I. Proof by Inference

You are permitted to deduce, that is reason, from facts proved beyond a reasonable doubt: That the defendant on or about the 21st day of January, 1974, in Pondera County, Montana, without the consent of Lana Harding, who was not his wife, knowingly had sexual intercourse with her, and to find beyond a reasonable doubt, that he committed the offense of sexual intercourse without consent as charged.

II. Proof by Presumption

Since the offense of sexual intercourse without consent does not require that the act be done purposely or for a particular purpose and may be proved by showing the act was knowingly done, proof of such mental state can be made by presumption.

Therefore, since the law presumes that an unlawful act was done with an unlawful intent if you reason from facts proved beyond a reasonable doubt that the defendant on or about January 21st, 1974, in Pondera County, Montana, had sexual intercourse with Lana Harding who was not his wife, and without her consent, you are expressly directed to reason therefrom, that he did so knowingly, and you may find therefrom beyond a reasonable doubt that he committed said offense as charged.

This presumption that an unlawful act was done with an unlawful intent is a rebuttable presumption subject to being controverted and overcome as you may find the evidence to be.

NO. 28

Methods of Proof Applicable To The Offense of Aggravated Assault.

I. Proof by Inference

You are permitted to reason from facts proved beyond a reasonable doubt:

(a) That the defendant on or about the 21st day of January, 1974, in Pondera County, Montana, either knowingly or purposely caused Lana Harding serious bodily harm (as distinguished from just bodily harm) without the use of a weapon, and/or

(b) That on or about the 21st day of January, 1974, in Pondera County, Montana, the defendant either knowingly or purposely with a weapon, inflicted bodily harm (as distinguished from serious bodily harm) on Lana Harding, and to find beyond a reasonable doubt that the defendant committed the offense as charged.

II. Proof by Presumptions

Since the offense of aggravated assault may be committed either knowingly or purposely, the offense may be proved by showing the act was knowingly done, and the legal presumptions that: "An unlawful act was done with an unlawful intent, and the legal presumption that a person is presumed to intend the ordinary consequences of his voluntary act," can be used to prove the mental state of knowingly.

Therefore, if you reason from facts proved in the evidence beyond a reasonable doubt that the defendant on or about the 21st day of January, 1974, in Pondera County, Montana, unlawfully caused Lana Harding bodily injury either with or without a weapon, the law expressly directs you to reason therefrom that he acted with unlawful intent that is purposely; and if you further reason from facts proved beyond a reasonable doubt that the harm inflicted by him was such as ordinarily results from an act such as defendant's, the law expressly directs you to reason that he intended the consequences of his act.

These presumptions "that an unlawful act was done with an unlawful intent", and "A person is presumed to intend the ordinary consequences of his voluntary act", are both rebuttable presumptions, each being subject to being controverted and overcome by other evidence as you may find the evidence to be.

NO. 29

Circumstantial Evidence - Test of Sufficiency

You are instructed when the proof of any allegation

required to prove a criminal offense against a defendant rests entirely on indirect or circumstantial evidence, the defendant may not be found guilty of the offense unless:

1. Each fact or circumstance which is presented to complete a chain of circumstances that will establish guilt must be proved beyond a reasonable doubt, and

2. Such proved facts and circumstances must be consistent only with a hypothesis of guilt and inconsistent with any other rational conclusion.

This does not mean that each proved fact or circumstance considered alone must be consistent only with a hypothesis of guilt, but that each fact or circumstance from which guilt may be deduced or reasoned must be proved beyond a reasonable doubt and that all of the proved facts and circumstances when considered together and as a whole give rise to the deduction or reasoning that the defendant is guilty. The doctrine of reasonable doubt applies only to the proof of guilt and not to proving that each link in a chain of evidence used to show guilt is consistent only with guilt. Any proved fact or circumstance when considered by itself may give rise to an inference which is as equally consistent with innocence as it is with guilt, but all of the proved facts and circumstances when considered together must be consistent only with a hypothesis or inference of guilt and inconsistent with any other rational inference or deduction.

NO. 40

If the evidence in this case as to any particular charge is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

NO. 41

Production Of All Evidence Not Required

Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence.

NO. 42

Direct and Circumstantial Evidence Equally Entitled to Consideration.

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, juries lawfully may base their findings, whether favorable to the State of Montana or to the defendant, provided, however, that to support a verdict of guilt the evidence, whether of one kind or the other or a combination of both, must carry the convincing quality required by law.

One type of evidence is known as direct and the other as circumstantial. The law makes no distinction between the two classes as to the degree of proof required for conviction or as to their effectiveness in defendant's favor, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

NO. 43

Regarding Failure of Defendant to Testify.

It is a Constitutional right of a defendant in a criminal trial that a defendant may not be compelled to testify.

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence, and upon the failure, if any, of the prosecution to prove every essential element of the particular charges against him. No lack of testimony on the defendant's part will supply a failure of proof by the prosecution so as to support by itself a finding against him on any essential element

of a particular charge or charges.

If the defendant chooses not to testify you are not to consider his choice in any manner as evidence against him nor to allow it to prejudice your deliberations in any way.

NO. 44

Credibility of Witnesses and Presumption of Truth.

The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The term "witness" includes every person whose testimony under oath has been received as evidence, whether by examination here in court or through deposition.

The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, that is whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, for or against one or any of the parties; by the character of his testimony, or by contradictory evidence. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

NO. 25

Impeachment by Contradictory Statements.

In respect to any attempt to impeach a witness by showing that on some former occasion he made a statement or statements that are contradictory of his testimony here, you are instructed that the evidence of any such contradictory statement is not received for the purpose of proving the truth of what then was said, but only for the purpose of testing the credibility of the witness; you are permitted to consider such evidence only for that purpose, and you are the exclusive judges of the effect of such evidence on the witness's credibility.

NO. 26

Regarding Expert Testimony.

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion

with the reasons stated therefor, if any, by the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

NO. 27

Regarding Evidence Admitted For a Limited Purpose

At times throughout the trial of this case evidence was admitted for a limited purpose or purposes. You are to consider the evidence admitted for a limited purpose or purposes for that purpose or those purposes only.

NO. 28

Direct Evidence of One Witness Sufficient

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case.

NO. 29

Distrust of Witness Found Wilfully False

A witness wilfully false in one material part of his testimony is to be distrusted in other parts thereof.

NO. 30

Regarding Court Rulings on Evidence

At times throughout the trial, the Court will be called upon to pass on the question whether or not certain offered evidence may properly be admitted. You

are not to be concerned with the reason for the rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected, or any evidence that has been ordered stricken out by the Court, you, of course, must not consider the same; as to any questions as to which an objection was sustained, you must not conjecture as to what the answer might have been, or as to the reason for the objections, nor may you draw any inferences from the question itself.

NO. 51

Do Not Speculate or Make Unwarranted Inferences

Do not speculate, conjecture, or make unwarranted inferences as to what the facts might be, and do not assume the existence of any facts unless there is evidence to justify the conclusion. Nor can you act upon any information, other than the evidence given to you in court; that is, stipulations of counsel, exhibits admitted into evidence and witnesses whose sworn testimony is given and admitted in court. You should consider all of the evidence bearing either way on the question presented to you, regardless of which side has produced it.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce

conviction in your mind as against the declarations of a lesser number, or a presumption or other evidence which appeals to your mind with more convincing force.

This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

NO. 52

Charge of Deliberate Homicide By Lying In Wait or Ambush Dismissed

The charge of Deliberate Homicide By Lying in Wait or Ambush has been dismissed by the Court and you are not to concern yourselves with this charge, contained in Count II of the Information filed against the defendant.

NO.

Defense of Mental Disease or Defect Excluding Responsibility.

I.

The defendant has served notice on the Court that he suffers from a mental disease or defect which excludes his responsibility for the acts charged against him by the State of Montana and that he intended to introduce evidence in support of this defense.

By this notice and defense, he does not admit that he committed the acts charged against him, but in effect says if you find beyond a reasonable doubt that I did do said acts or any of them, that because of a disease or defect of the mind from which I suffered I was unable at that time to appreciate that said acts were criminal, or in the alternative, if I did appreciate the criminality of the acts I was unable because of said mental disease or defect to avoid the commission of said acts.

II.

Mental Disease or Defect Excluding Responsibility - Definition.

A person is not responsible for criminal conduct, if at the time of such conduct, as a result of a mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The term "mental disease or defect" does not include an abnormality or subnormality of the mind manifested only by repeated criminal or otherwise antisocial conduct, but does include any mental abnormality or subnormality that has reached the degree that a person affected thereby is unable to appreciate that an act is criminal; that is,

that the act is wrong and is punishable by the law, and it also includes such persons who may know that acts are wrong and are subject to punishment, but are unable to avoid the commission of the prohibited acts, because of some mental abnormality or subnormality.

In the degree of their individual physical attributes and abilities people differ, and, likewise, they differ individually in their degrees of intellect, their ability to understand and appreciate, their knowledge, their learning, their morality and in the degree that each is able to resist doing that which he or she knows to be wrong and punishable by law.

The law in order to protect the individual person and his or her rights recognizes that these mental differences exist, but in order to protect society the law does not measure and it does not even attempt to measure mental differences in individuals until and unless the differences in question have reached the point that the differences can be truly termed a mental disease or defect which precludes the power of thought and reason and either renders the afflicted person incapable of appreciating that an act is criminal, or is unable to resist doing the criminal act because of said mental disease or defect if he does appreciate the criminality thereof.

When the defense of mental disease or defect excluding responsibility for criminal conduct has been interposed the jury must determine under the definition thereof given by the Court and from all the evidence in the case whether or not the defendant suffered from

such a disease or defect of the mind that it excludes his responsibility for the conduct charged against him.

III.

Burden of Proof - Mental Disease or Defect Excluding Responsibility For Conduct.

Mental disease or defect exluding responsibility for criminal conduct is an affirmative defense, which means that the defendant must give advance notice thereof and prove this defense by a preponderance of the evidence.

By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has the more convincing force and the greater probability of truth.

The law has placed this burden on defendants in criminal cases because in law all persons are presumed to be sane and to be accountable for their conduct (that is the law expressly directs the jury to so reason). This presumption that all persons are sane and are accountable for their conduct is a rebuttable presumption which the defendant has the burden of controverting and overcoming.

Therefore, if you find beyond a reasonable doubt that the defendant did do the act or any of the acts charged against him you are expressly directed by the law to deduce or reason that at the time of such conduct he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

To overcome this express direction of the law the

defendant must prove by a preponderance of the evidence, that he suffered from such an abnormality or subnormality of the mind at the time of such conduct that the jury cannot say that it does not have a reasonable doubt as to his responsibility for such conduct.

Since the defendant, by the interposing of the defense of disease or defect of the mind which excludes responsibility for conduct, does not admit any of the acts charged against him, and since the defense goes only to the mental responsibility and control of the defendant, you should first determine from the evidence in the case beyond a reasonable doubt whether the defendant did do the acts charged against him in the Information. If you find beyond a reasonable doubt that the defendant did do said acts or any of them you must then consider whether or not the defendant has overcome the presumption of accountability and whether or not he has created a reasonable doubt in your minds as to his mental accountability and responsibility for any of the acts you may find he committed, and whether or not he could have had the requisite mental state for the act or acts which you have found he committed.

NO 54

Verdict Forms and Instructions As to Their Use

Upon retiring to your jury room you will select one of the jurors to act as foreman, who will preside over your deliberations, and who will date and sign the verdict or verdicts and which you agree.

In order to return a verdict, all twelve jurors must agree to the decision, including the additional findings you are asked to make on the Guilty of Deliberate Homicide verdict form and on the Guilty of Aggravated Kidnapping verdict form.

I.

Verdict Form - Mental Disease or Defect Exluding Responsibility For Conduct

If after considering all of the charges made against the defendant you have found that the defendant committed the acts charged, or did commit any of the acts charged, and have further determined that he suffered from a mental disease or defect which excludes his responsibility for said act or acts, you are furnished with a form upon which to return such a verdict, to wit: Not Guilty of any of the offenses charged against him because of a mental disease or defect which excludes responsibility for his conduct.

If you reach this verdict have your foreman date and sign this verdict form and return with it to the courtroom.

If, of course, you do not find that the defendant committed any of the acts charged, you will not need to use this form, but instead will return a verdict of Not Guilty of any of the offenses charged against him on a verdict form furnished you for such a verdict.

II.

Verdict Forms - Deliberate Homicide

You are to consider each and all of the charges remaining against the defendant, and even though you may find more than one or all of said charges to have been proved beyond a reasonable doubt, as only one death is alleged, only one Guilty of Deliberate Homicide verdict form is required.

You are also furnished with a Not Guilty of Deliberate Homicide verdict form to use if such is your verdict.

If you adopt the Guility of Deliberate Homicide verdict form you are asked to find on that form whether the Deliberate Homicide was or was not By Means of Torture as this is the most serious of the remaining charges of Deliberate Homicide made against the defendant.

After you have reached a verdict on the charges of Deliberate Homicide, whether Guilty or Not Guilty, you are still required to return a verdict on the charges of Aggravated Kidnapping. Have your foreman date and sign the verdict form upon which you agree on the charges of Deliberate Homicide and take up the Charges of Aggravated Kidnapping.

III.

Verdict Forms - Aggravated Kidnapping

Since only one Aggravated Kidnapping is alleged, though in different ways and for different purposes, you are to consider all of the charges of Aggravated Kidnapping made against the defendant and even though

you may find more than one or all of the charges of Aggravated Kidnapping to have been proved beyond a reasonable doubt you are furnished with only one verdict form upon which to return a verdict of Guilty of Aggravated Kidnapping.

You are also furnished with a Not Guilty of Aggravated Kidnapping verdict form to use if such is your verdict.

If you adopt the Guilty of Aggravated Kidnapping form you will be required to find on that form whether Lana Harding did or did not die as a result of said Aggravated Kidnapping.

After you have reached a verdict on the Charges of Deliberate Homicide and a verdict on the charges of Aggravated Kidnapping, if you have found him Guilty of Deliberate Homicide or Guilty of Aggravated Kidnapping or Guilty of both of said offenses, have your foreman date and sign the verdict forms and return with them to the Court, for if you have found him guilty of either or both Deliberate Homicide and/or Aggravated Kidnapping the remaining charges of Sexual Intercourse without Consent, Aggravated Assault and Kidnapping are all lesser offenses which are included in the charges of Deliberate Homicide, and Aggravated Kidnapping in this case.

If you have found the defendant Not Guilty of Deliberate Homicide and Not Guilty of Aggravated Assault you are required then to return a verdict on the charge of Sexual Intercourse Without Consent which is the most serious of the remaining charges.

IV

Verdict Forms - Sexual Intercourse Without Consent

If you have adopted the Not Guilty of Deliberate Homicide verdict form and have adopted the Not Guilty of Aggravated Kidnapping verdict form, you have been furnished with a verdict form for Guilty of Sexual Intercourse Without Consent and a verdict form for Not Guilty of Sexual Intercourse Without Consent. Use the form which you find to be appropriate.

If you adopt the Guilty of Sexual Intercourse Without Consent Verdict Form, have your Foreman date and sign the form and return with it to the Courtroom.

If you adopt the Not Guilty of Sexual Intercourse Without Consent you are then required to take up the charges of Aggravated Assault.

V.

Verdict Forms - Aggravated Assault

If you have found the defendant Not Guilty of Deliberate Homicide, and Not Guilty of Aggravated Kidnapping and Not Guilty of Sexual Intercourse Without Consent, you are to consider all of the charges of Aggravated Assault made against the defendant and even though you may find more than one or all of said charges of Aggravated Assault to have been proved beyond a reasonable doubt, only one Guilty of Aggravated Assault verdict form is furnished upon which to return such a verdict.

You are also furnished with a Not Guilty of Aggravated Assault verdict form if such is your verdict.

If you adopt the Guilty of Aggravated Assault

verdict form, have your foreman date and sign the form and return with it to the Courtroom.

If you adopt the Not Guilty of Aggravated Assault verdict form, you are required to reach a verdict on the remaining charge of kidnapping.

VI.

Verdict Forms - Kidnapping

If you have adopted the verdict form Not Guilty of Deliberate Homicide and the verdict form not guilty of Aggravated Kidnapping and the verdict form Not Guilty of Sexual Intercourse Without Consent and the verdict form Not Guilty of Aggravated Assault, you have been furnished with a verdict form upon which to return a verdict of Guilty of Kidnapping and a verdict form upon which to return a verdict of Not Guilty of Kidnapping.

If you adopt the Guilty of Kidnapping verdict form, have your foreman date and sign it and return with it to the Courtroom.

If you adopt the Not Guilty of Kidnapping verdict form you will have acquitted the defendant of all charges made against him, and rather than returning separate and multiple Not Guilty verdict forms, you have been furnished with a verdict form for Not Guilty of Any of the Offenses charged against him. Have your foreman date and sign this verdict and return with it to the Courtroom if this if your verdict.

VII.

Verdict Form - Not Guilty of any of the Offenses Charged.

This form is for your use if you find that the defendant is not guilty of any of the offenses charged

against him, and have not adopted the verdict form of Not Guilty of any of the Offenses charged because of a Mental Disease or Defect which exludes repsonsibility for conduct.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Montana Revised Codes Annotated (1976 supp.):

§94-5-101:

> "Criminal homicide. (1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.
>
> (2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide."

§94-5-102:

> "Deliberate homicide. (1) Except as provided in section 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:
>
> (a) it is committed purposely or knowingly; or
>
> (b) it is committed while the offender is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnaping, felonious escape or any other felony which involves the use or threat of physical force or violence against any individual.
>
> (2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in section 94-5-105, or by imprisonment in the state prison for any term not to exceed one hundred (100) years."

§94-5-105(1974 supp.):

> "Sentence of death for deliberate homicide. (1) When a defendant is convicted of the offense of deliberate homicide the courts shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:
>
> (a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
>
> (b) The defendant was previously convicted of another deliberate homicide; or
>
> (c) The deliberate homicide was committed by means of torture; or
>
> (d) The deliberate homicide was committed by a person lying in wait or ambush; or

> (e) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person."__/

§94-5-303:

> "Aggravated kidnaping. (1) A person commits the offense of aggravated kidnaping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by using or threatening to use physical force, with any of the following purposes:
>
> (a) to hold for ransom or reward, or as a shield or hostage; or
>
> (b) to facilitate commission of any felony or flight thereafter; or
>
> (c) to inflict bodily injury or to terrorize the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function; or
>
> (e) to hold another in a condition of involuntary servitude.
>
> (2) A person convicted of the offense of aggravated kidnaping shall be punished by death as provided in section 94-5-304, or be imprisoned in the state prison for any term not to exceed one hundred (100) years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned

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__/ Subsequent to January 21, 1974 (the date of the crimes petitioner was tried for), the Montana Legislature amended the 1973 death penalty statute. Montana Session Laws 1974, c. 126, effective March 11, 1974, amended Mont. Rev. Codes Ann. §94-5-304 to make the death penalty mandatory for aggravated kidnaping. Montana Session Laws 1974, c. 262, effective July 1, 1974, amended Mont. Rev. Codes Ann. §94-5-105 to make the death penalty mandatory for deliberate homicide when the victim was "a peace officer killed while performing his duty."

In 1977 the Montana capital sentencing system was again substantially overhauled, by privisions: requiring in all cases where "a defendant is found guilty or pleads guilty to an offense for which the sentence of death may be imposed" a "separate sentencing hearing" before the trial judge to determine the existence or nonexistence" of aggravating and mitigating circumstances, 2206.6, R.C.M. 1947 (1977 supp.); declaring admissible in that proceeding "evidence . . . as to any matter the court considers relevant . . . including . . . facts in mitigation or aggravation," Id. at §95.2206.7, defining what those circumstances are, Id. at §95.2206 and §95.2206.9, and providing for expedited review of both sentence and trial errors by the Supreme Court of Montana. Id. at §95-2206.6 to 95-2206.15. As of the writing

)5-5-304(1974 supp.):

"Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct, unless there are mitigating circumstances."

§95-501(1969):

"Mental disease or defect excluding responsibility. (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) As used in this chapter, the term 'mental disease or defect' does not include an abnormality manifested only by [repeated] criminal or otherwise antisocial conduct."

§95-502(1969):

"Evidence of mental disease or defect admissible when relevant to element of the offense. Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."

§95-503(1969):

"Mental disease or defect excluding responsibility is affirmative defense -- requirement of notice -- form of verdict and judgement when finding of irresponsibility is made. (a) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence.

(b)(1) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten (10) days thereafter or at such later time as the court may, for good cause, permit, files a written notice of his purpose to rely on such defense.

(2) The defendant shall give similar notice when in a trial on the merits, he intends to rely on a mental disease or defect, to prove that he did not have a particular state of mind which is an essential element of the offense charged. Otherwise, except on good cause shown, he shall not introduce in his case in chief, expert testimony in support of that defense.

(c) When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state."

§95-701(1969):

"Searches and seizures -- when authorized. A search of a person, object or place may be made and instruments, articles or things may be seized in accordance with the provisions of this chapter when the search is made:

(a) As an incident to a lawful arrest.

(b) With the consent of the accused or of any other person who is lawfully in possession of the object or place to be searched, or who is believed upon reasonable cause to be in such lawful possession by the person making the search.

(c) By the authority of a valid search warrant.

(d) Under the authority and within the scope of a right of lawful inspection granted by law."

§95-703(1969):

"Search warrant defined. A search warrant is an order in writing, in the name of the state, signed by a judge, particularly describing the thing or place to be searched and the instruments, articles or things to be seized, directed to a peace officer, commanding him to search for personal property and bring it before the judge."

§95-704(1969):

"Grounds for search warrant. Any judge may issue a search warrant upon the written application of any person that an offense has been committed, made under oath or affirmation before him which:

(a) States facts sufficient to show probable cause for issuance of the warrant,

(b) Particularly describes the place or things to be searched, and

(c) Particularly describes the things to be seized."

§95-705(1969):

"Scope of search with warrant. A search warrant may authorize the seizure of the following:

(a) Contraband.

(b) Any instruments, articles or things which are the fruits of, have been used in the commission of, or which may constitute evidence of, any offense.

(c) Any person who has been kidnaped in violation of the laws of this state, or who has been kidnaped in another jurisdiction and is now concealed within this state."

§95-708(1969):

"Service and execution of search warrants. Service of a search warrant is made by exhibiting the original warrant at the place to be searched. If the warrant is executed, a duplicate copy, and a receipt for all articles taken shall be left with any person from whom any instruments, articles or things are seized, or, if no person is available, the copy and receipt shall be left at the place from which the instruments, articles or things were seized. Failure to give or leave such a receipt shall not render the evidence inadmissible in a trial."

§95-712(1969):

"Return to court of things seized under search warrant. The return of the warrant and all instruments, articles and things seized shall be made promptly before the judge who issued the warrant, or if he is absent or unavailable, before the nearest available judge and shall be accompanied by a written inventory of any property taken, verified by the person executing the warrant. The judge shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant."

§95-2206.1(1975 supp.):

"Sentence to death. When a person is convicted of an offense punishable by death or imprisonment, the court may sentence the offender to death or imprisonment."

§95-2212(1969):

"Sentence to be imposed by judge. All sentences under this chapter shall be imposed exclusively by the judge of the court."

§95-2301(1969):

"Commitment of defendant. Upon rendition of judgment after pronouncement of a sentence imposing punishment of imprisonment or death the court shall commit the defendant to the custody of the sheriff who shall deliver the defendant to the place of his confinement or execution."

§95-2303(1969):

"Execution of death. (a) The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

(b) In pronouncing the sentence of death, the court shall set the date of execution which must not be less than thirty (30) days nor more than sixty (60) days from the date the sentence is pronounced.

(c) A sentence of death must be executed within the walls or yard of a jail or some convenient private place in the county where the trial took place.

(d) The sheriff of the county must be present and shall supervise such execution which shall be conducted in the presence of a physician, the county attorney of the county, and at least twelve (12) reputable citizens to be selected by the sheriff. The sheriff shall at the request of the defendant, permit such priests or ministers, not exceeding two (2), as the defendant may name and only persons, relatives or friends, not to exceed five (5), to be present at the execution. No other persons than those mentioned in this subsection can be present at the execution, nor can any person under age be allowed to witness the same.

(e) After the execution, the sheriff must make a return upon the death warrant, showing time, mode and manner in which it was executed."

§95-3004(1975 supp.):

"The burden in a homicide trial . . .

(b) In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation excuse or justification appear."

Supreme Court, U. S.
FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-5617

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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STATE PUBLISHING CO HELENA, MONT

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STATE PUBLISHING CO HELENA MONT

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978
No. 78-5617

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

Respondent, State of Montana, respectfully requests that this Court deny the petition for writ of certiorari.

Respondent accepts petitioner's citation of the opinion below, the jurisdictional statement, and the statement as to the manner in which the questions were raised below.

QUESTIONS PRESENTED

Respondent respectfully disagrees with petitioner's statement of questions 2 and 3. Those questions, as phrased, ignore important factual and legal predicates which were resolved adversely to petitioner by the Montana courts. Respondent has rephrased 2 and 3 as follows:

2. Whether the Montana Supreme Court's holdings that (1) the prosecution was not relieved from proving an element of the offenses charged beyond a reasonable doubt and that (2) the lack of mental disease or defect and the concurrent mental capacity to act with conscious purpose or knowledge are not elements of either the crime of deliberate homicide or aggravated kidnaping under Montana law, are so extra-

STATE PUBLISHING CO HELENA MONT

ordinary or incredible as to require this Court to reinterpret Montana deliberate homicide and aggravated kidnapping statutes.

3. Whether there was a valid and enforceable plea bargain agreement between petitioner and the State of Montana.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has ignored and omitted important sections of the Montana Revised Codes Annotated, specifically Sections 95-2201, 95-2203, 95-2204, 95-2501, 95-2502, 95-2503, 95-2508, 95-2601, 95-2602, 95-2603, and 95-2604, Mont. Rev. Codes Ann. The omitted sections are set forth in an appendix to this brief, infra, pp. A-1 through A-4.

STATEMENT OF CASE

Petitioner was convicted of the kidnapping, rape, and torture-murder of a young woman. His crimes were brutal and vicious.[1]

Petitioner's death sentence and convictions of aggravated kidnapping and deliberate homicide were affirmed by the Montana Supreme Court in 1976. State v. McKenzie (I), 557 P.2d 1023 (1976). The 1976 decision was followed by a first petition for writ of certiorari, setting forth five issues for review. One of those issues concerned

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[1] The victim, a rural school teacher, was reported missing January 22, 1974. Her body was discovered January 23, 1974, clothed only in a shirt, sweater and bra. She had been savagely beaten, the death blow laying open the right side of her head. (Tr. 560-571, 577-579, 1397.) A rope had been used to garrotte her a half hour prior to her death and she would have died of strangulation had not the rope been released. (Tr. 553, 585-594, 717-719.) She had been raped. (See Tr. 601-64, 607, 613.) The evidence connecting defendant to the crimes is extensively stated in the opinions below.

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allocation to petitioner of the burden of proving a diminished capacity defense.[2] Petitioner, citing Mullaney v. Wilbur, 421 U.S. 684 (1974), alleged that the state had been thereby relieved of its burden of proving the "mental element" of the crimes charged beyond a reasonable doubt.[3] While the petition was pending, this Court decided Patterson v. New York, 432 U.S. 197 (1977). Following Patterson the Court granted certiorari in this case, vacated the judgment and remanded to the Montana Supreme Court for further consideration in light of Patterson. McKenzie v. State of Montana, 433 U.S. 905 (1977).

Upon remand, the Montana Supreme Court reviewed not only those issues touched by Patterson but reconsidered all issues which had been raised by petitioner in his first appeal. It again affirmed.[4] State v. McKenzie (II), 581 P.2d 1205 (1978).

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[2] "Diminished capacity" is a convenient, shorthand term employed by the Montana Supreme Court to refer to a defense under Section 95-502, Mont. Rev. Codes Ann. Section 95-502 provides:

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense.

[3] Petitioner also challenged the allocation of the burden of proof with respect to a legal insanity defense. Petitioner has not renewed this contention in the second petition.

[4] Like McKenzie (I), there was a single dissent in McKenzie (II). In McKenzie (I), District Judge Robert Boyd, sitting by designation, dissented with respect to the admission of photographic evidence. In McKenzie (II), Justice Shea, who was not a member of the Court at the time of the first McKenzie decision, dissented with regard to search and seizure and death penalty issues. The dissent includes a passionate, personal attack upon the majority of the Court, accusing the majority of deceiving the reader and asserting that a first year law student would recognize legal distinctions the majority failed to perceive. 581 P.2d at 1235, 1244.

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In McKenzie (II), the Montana Supreme Court considered Patterson, but determined as a matter of statutory construction of Montana's criminal code that a defendant's mental capacity and sanity are not elements of any of the crimes charged against petitioner. It held that diminished mental capacity under Section 95-502, Mont. Rev. Codes Ann., is an affirmative defense which must be proved by a defendant by a preponderance of evidence. 581 P.2d at 1232-1234. The Court further concluded, as a factual matter, that the jury instructions given in petitioner's case were more lenient than provided by statute. It construed the instructions as requiring petitioner to raise only a "reasonable doubt" with respect to his diminished capacity defense. 581 P.2d at 1234-1235. Finally, the Court declared that it was convinced beyond a reasonable doubt that petitioner had acted purposely and knowingly. 581 P.2d at 1224.

This second petition follows. Petitioner renews the claims made in his first petition with one exception - he has deleted a challenge to the allocation of the burden of proof with respect to a legal insanity defense.

REASONS WHY THE WRIT SHOULD BE DENIED

The respondent respectfully requests that this Court deny certiorari because the decision below turns upon its own, unique set of facts and the petition fails to present important constitutional issues. As will more specifically appear, much of the petitioner's argument is little more than an attempt to controvert factual questions resolved against him by the trial court and the Montana Supreme Court. He requests in essence, that this Court review and readjudicate, in his favor, necessary factual predicates to

his constitutional challenges. Other parts of petitioner's argument are in the nature of requests that this Court reconsider well settled areas of constitutional law; impose federal uniformity in areas of criminal procedure which have repeatedly and consistently been reserved to the States; and take upon itself the business of interpreting State statutes. The petitioner fails to demonstrate any conflict or significant difference between the decision below and the decisions of this Court.

I. THE PETITION FAILS TO IDENTIFY ANY CONSTITUTIONALLY SIGNIFICANT DIFFERENCES BETWEEN MONTANA'S 1973 DEATH PENALTY LAWS AND THE DEATH PENALTY PROVISIONS SUSTAINED IN GREGG, JUREK AND PROFITT, OR DEMONSTRATE ANY FAILURE OF THE TRIAL COURT TO FOLLOW MONTANA DEATH PENALTY SENTENCING PROCEDURES.

Petitioner prefaces his argument in support of his request that this Court review Montana's post-Furman 1973 death penalty statutes by a declaration that this case involves the only death sentence imposed under the 1973 statutes.[5] The statement is misleading. Since 1973 the death penalty has been pronounced five times in Montana.[6]

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[5] Petition for Writ of Certiorari, p. 18.

[6] Bernard Fitzpatrick, Gary Radi, Dewey Coleman and Robert Close, in addition to petitioner, have been sentenced to death since 1973. Fitzpatrick's and Radi's convictions were reversed for procedural errors in State v. Fitzpatrick, 569 P.2d 373 (Mont. 1977). Upon remand, Radi was acquitted. Fitzpatrick was reconvicted and the death penalty was again imposed; a second appeal is presently pending in the Montana Supreme Court, State v. Fitzpatrick, Docket No. 14422. Coleman's conviction was affirmed in State v. Coleman, 579 P.2d 732 (Mont. 1978), but his death sentence was vacated. Coleman was sentenced under the 1974 amendments to Montana death penalty statutes; those amendments made the death penalty mandatory for aggravating kidnapping resulting in the death of the victim. The Court declared the mandatory feature unconstitutional and remanded for resentencing. After remand, Coleman was again sentenced to death under Montana's 1977 death penalty amendments. Those amendments require consideration of mitigating circumstances in all capital cases. A second appeal is now pending in the Montana Supreme Court. State v. Coleman, Docket No. 14448. Finally, Robert Close has appealed his death sentence, State

While the other four defendants were sentenced after petitioner, and after the 1974 amendments to death penalty provisions,[7] the death penalty has been imposed in approximately on case each year. Thus, there is little significance in the fact that petitioner was the only defendant sentenced for a crime committed in the one year interval between enactment of the 1973 statute and its first amendment.

1. In the first part of his death penalty argument, petitioner attacks aggravating and mitigating circumstance provisions of the 1973 death penalty statute. Certainly these provisions differ in some respects from those which were approved in Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); and Proffitt v. Florida, 428 U.S. 242 (1976). But the holdings of those cases and Furman v. Georgia, 408 U.S. 238 (1972) do not require death penalty statutes of other states to parrot every detail and procedure of Georgia, Texas and Florida death penalty statutes in order to pass constitutional muster. "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death." Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 990 (1978). Significantly, even the approved Georgia, Texas and Florida death

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6 (cont) v. Close, Montana Supreme Court Docket No. 13522, but further proceedings have been stayed pending action of the Governor upon his application for commutation of sentence.

7 The 1974 amendments, 1977 Montana Laws, ch.'s 126 and 262, deleted provision for consideration of mitigating circumstances in connection with sentencing for aggravated kidnaping resulting in the death of the victim and made the death penalty mandatory upon conviction of deliberate homicide resulting in the death of a peace officer.

penalty statutes differed from one another in many respects.[8] What the statutes all shared in common was the requirement that the death penalty be imposed upon a finding of one of a limited number of specific aggravating circumstances; a requirement that specified mitigating circumstances be considered in determining whether to impose the death penalty; and provision for judicial review of death sentences. The 1973 Montana death penalty statutes share those same features. McKenzie (II), 581 P.2d at 1228-1229.

Petitioner's assertion that the 1973 Montana statutes merely "papered over" unguided and unchecked discretion of prior death penalty procedures by making "a mandatory death penalty the presumptive sentence for a broad roster of criminal offenses,"[9] collides head on with the decisions in Jurek and Proffitt. In Gregg, a similar contention was made that the changes in Georgia's death penalty provisions were merely "cosmetic" and that enumerated aggravating circumstances were so broad and vague that the death sentence could be imposed upon virtually any first degree murder conviction. 428 U.S. at 198-200. The 1973 Montana death penalty statutes provide for only six aggravating circumstances.[10] In comparison, Georgia statutes provide ten,

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8 The Florida statutes delegated the final sentencing decision to the trial judge, while those of Georgia and Texas delegated it to the jury; the Texas statutes provided for a finding of aggravating circumstances in conjunction with the jury's determination of guilty, while those of Georgia and Texas reserved determination of the existence of an aggravating circumstance until a separate sentencing proceeding; and all three statutes differed as to the specifics of appeallate review and the enumerated aggravating and mitigating circumstances.

9 Petition for Writ of Certiorari, p. 21.

10 Section 94-5-105, Mont. Rev. Codes Ann. (1974 supp.) provided:

Sentence of death for deliberate homicide. (1) When a defendant is convicted of the offense of deliberate homicide the courts shall impose a sentence of death in

and Florida statutes eight, aggravating circumstances. Significantly, the two aggravating circumstances found to exist in the present case - deliberate homicide by means of torture and aggravated kidnapping resulting in the death of the victim - both have counterparts in Georgia and Florida aggravating circumstance provisions.[11]

Arguments made by petitioner concerning provision for mitigating circumstances are no more than a dispute over matters of statutory construction of state law. The

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10 (cont)

the following circumstances, unless there are mitigating circumstances:
(a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
(b) the defendant was previously convicted of another deliberate homicide; or
(c) The deliberate homicide was committed by means of torture; or
(d) The deliberate homicide was committed by means of torture; or
(e) the deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

Section 94-5-304, Mont. Rev. Codes Ann. (1974 supp.) provided:

Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct, unless there are mitigating circumstances.

11 See, Gregg, supra, 428 U.S. at 165 (n.9) and Proffitt, supra, 428 U.S. at 248 (n.6). The death of the victim as aggravating circumstance for kidnaping under the Montana law corresponds to the felony-murder provision of subsecton (d) of Florida aggravating circumstances and subsection (b)(2) of Georgia aggravating circumstances. Torture as an aggravating circumstance is similar to a subsecton (h) aggravating circumstance under Florida's statute, which provides, "(h) the capitol felony was especially heinous, atrocious or cruel," and subsection (b)(7) of the Georgia statute, which provides, "(7) the offense of murder, rape, armed robbery or kidnaping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated batter to the victim."

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Montana Supreme Court determined that death penalty provisions cannot be read in isolation of other sentencing provisions. It held, specifically, that the provisions for consideration of mitigating circumstances must be read together with Sections 95-2201 and 95-2204, Mont. Rev. Codes Ann. Section 95-2204 requires preparation of a presentence report specifying the circumstances of the offense and the individual characteristics of the defendant.[12] Section 95-2201 requires the sentencer to consider the individual characteristics of a defendant in pronouncing sentence. Finally, individualized sentencing requires a sentencing hearing at which a defendant is entitled to present testimony and evidence in mitigation of punishment. 581 P.2d at 1229.

In construing death penalty and sentencing statutes, the Montana Supreme Court did no more than the Texas Supreme Court did in Jurek when it broadly construed Texas provisions for mitigating circumstances.[13] Petitioner has failed to demonstrate any extreme or compelling circumstances justifying abrogation of the rule that "state courts are the ultimate expositors of state law." Mullaney v. Wilbur, 421 U.S. 684, 690-691 (1975). Moreover, he ignores the fact that Texas death penalty statutes approved in Jurek

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12 Section 95-2204 provides:
Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court.

13 See, Jurek, supra, 428 U.S. at 269-274.

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did not "explicitly speak of mitigating circumstances" but provided for the jury to answer only three questions. The statutory location, label, and language of provisions for mitigating circumstances is not constitutionally critical. What is significant is that the procedures, as interpreted and applied, provide for the broadest possible consideration of the circumstances of the crime and the individual characteristics of the defendant. Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 990 (1978), and see Jurek, supra, 428 U.S. at 269-274. Montana's provisions are broad enough to permit consideration of "any aspect of the defendant's character or record and any of the circumstances of the offense," Lockett, supra, 57 L.Ed. at 990, and the petitioner herein was afforded an unrestricted opportunity to present evidence rebutting any matter in his pre-sentence report and any new matter in mitigation of sentence.[14]

2. Petitioner's attack upon the lack of jury participation in capital punishment cases has no precedential support. While this Court has approved the practice of jury participation in sentencing decisions, it has "never suggested that jury sentencing is constitutionally required," Profitt, supra, 428 U.S. at 252. Judicial sentencing in capital cases was expressly sustained in Proffitt. Moreover, petitioner's argument for jury determination in the sentencing decision is, in part, specious. With respect to the determination of aggravating circumstances, this petitioner received the exact treatment he demands; the issue of aggravating circumstances was

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[14] Petitioner declined to present evidence (Tr. 2611-2612) and relied upon a "Petition and Motion in Mitigation," a copy of which is set forth in an appendix hereto at pp. A-5 through A-9.

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submitted to the jury, which found beyond a reasonable doubt that two aggravating circumstances existed.

3. Petitioner's assertion that his death sentence was based upon two erroneous factual predicates is meritless.

His argument concerning the trial court's use of the word "rape" in its sentencing decision is an effontry to common sense. In its sentencing order, the trial court referred to "the brutal, consciousless, torture, rape, and deliberate killing of a human being." (Emphasis added.) That statement cannot be ripped from the context of the case. Petitioner was charged and tried on a seven count information involving a single abduction and murder.[15] Count five charged petitioner with rape, but was never reached by the jury since the jury was specifically instructed to disregard any remaining counts of the information if it found petitioner guilty of deliberate homicide and aggravated kidnaping. (Tr. 2592, 2595-2596.) However, petitioner was convicted on count two, which charged him with deliberate homicide while engaged in the commission or attempt to commit the crime of "sexual intercourse without consent" or "aggravated assault".[16] He was additionally convicted on count three, which charged him with the aggravated kidnaping of Lana Harding for the purpose of committing the crime of "sexual intercourse without consent" or the crime of "aggravated assault". A review of the evidence

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[15] A copy of the information is reproduced in the appendix hereto at pp. A-10 through A-13.

[16] The element of "torture" of the deliberate homicide charge required a finding that the petitioner inflicted cruel suffering upon the victim for the purpose of extorting something from the victim, pursuading the victim against her will, or satisfying some untoward propensity of the petitioner. (Preliminary Instruction 23, Ct. File Item 154.)

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at trial demonstrates the impossibility of separating the rape element from the assault.[17] Finally, in the same sentencing order, the court specifically and correctly listed the offenses of which petitioner had been convicted.

Contrary to petitioner's assertion concerning a second erroneous factual predicate, the trial court's statement as to the time of petitioner's parole eligibility if sentenced to one hundred years imprisonment was a correct statement of the law. Section 95-3214, Mont. Rev. Codes Ann. (1974 Supp.) provided in relevant part:

> 1. That no convict serving a time sentence shall be paroled until he shall have served at least one-quarter (1/4) of his full term, less good time allowances off, as provided in section 80-740; except that any convict serving a time sentence may be paroled after he shall have served, upon his term of sentence, twelve and one-half (12 1/2) years; *** (Emphasis supplied.)

II. PETITIONER HAS FAILED TO POINT OUT ANY EXTRAORDINARY CIRCUMSTANCES REQUIRING REVIEW OF THE MONTANA SUPREME COURT'S DEFINITION OF THE STATUTORY ELEMENTS OF THE CRIMES OF DELIBERATE HOMICIDE AND AGGRAVATED KIDNAPING AND HAS FURTHER FAILED TO POINT OUT ANY JURY INSTRUCTION WHICH RELIEVED THE PROSECUTION FROM PROVING AN ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT

Petitioner's Mullaney and Patterson claims proceed happily along upon an assumption that mental capacity and sanity are elements of the crimes of deliberate homicide and aggravated kidnaping under Montana law, and upon a further assumption that trial instructions had the effect of telling

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17 The victim was found partially clothed, with semen on her body and in her vagina and a lacertaion adjacent to the vaginal orifice. (Tr. 601-604, 607-613.) A few days prior to the murder, petitioner purchased a new (used) truck and on the day prior to the discovery of the victim's body petitioner told a fellow worker that he broke in every new vehicle by having sexual intercourse in it. (Tr. 2085, 1752-1753.) Petitioner also had boasted that he had intercourse with country school teachers because they were naive and easy to get, and he could "teach them." (Tr. 2054 -2056).

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the jury to presume that he acted purposely and knowingly. These assumptions are essential to a colorable claim on his behalf. However, the foundations for both were shattered by the Montana Supreme Court's decision in McKenzie (II).

Respondent has no doubt that Patterson, Mullaney and In re Winship, 397 U.S. 358 (1970), require the prosecution to prove every element of a criminal offense beyond a reasonable doubt. The question is, what are the elements of a given criminal offense? In the present case, the Montana Supreme Court has definitively interpreted the Montana criminal code and held that the absence of insanity or a lack of mental capacity, are not elements of either deliberate homicide or aggravated kidnaping. It declared that diminished mental capacity is an affirmative defense, the non-existence of which does not have to be proved by the prosecution.

Petitioner, in effect, requests this Court to reject Montana's interpretation of its own criminal statutes, something this Court expressly refused to do even in Mullaney.[18] Such reinterpretation would upend deeply rooted legal concepts of "mens rea" and criminal responsibility.[19]

"Mens rea", which appears in Montana deliberate homicide and aggravated kidnapping statutes in the form of

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18 "This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, see, e.g., Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875); Winters v. New York, 333 US 507, 92 L Ed 840, 68 S Ct 665 (1948), and that we are bound by their constructions except in extreme circumstances not present here. Accordingly, we accept as binding the Main Supreme Judicial Court's construction of state homicide law." (Footnotes omitted.) Mullaney, supra, 421 U.S. at 691.

19 It would also have the effect of overruling Fisher v. United States, 328 U.S. 463 (1946) which sustained a trial court's refusal to instruct a jury that it should consider evidence of diminished capacity.

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"purposely or knowingly", is a legal fiction for effecting society's allocation of criminal and moral accountablity. Bethea v. United States, 365 A.2d 64, 87 (D.C. App. 1976). "Modern psychiatry to the contrary, the criminal law is grounded upon the theory that, in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible." Sauer v. United States, supra, 241 F.2d 640, 648 (9th Cir. 1957); and see also Davis v. United States, 160 U.S. 469, 486 (1895); Morissette v. United States, 342 U.S. 246, 250 (1952); and see also Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761 (1956).

Moreover, the jury instructions in this case do not even raise the issues described by petitioner. The jury was not instructed that petitioner bore the burden of proof of a diminished capacity defense, nor was it instructed to presume that petitioner acted purposely and knowingly.

The jury instruction burdening petitioner with establishing an insanity defense related solely to a legal insanity defense excluding criminal responsibility.[20] No similar burden of proof instruction was given with respect to a diminished capacity defense and the Montana Supreme

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[20] A legal insanity defense is one arising under Section 95-501, Mont. Rev. Codes Ann., which provides:

Mental disease or defect excluding responsibility.

(a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) As used in this chapter, the terms "mental disease or defect" does not include an abnormality manifested only by re-repeated criminal or otherwise antisocial conduct. (sic)

The diminished capacity defense arises under a separate provision, Section 95-502, Mont. Rev. Codes. Ann. See n. 2, supra.

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Court expressly found that the instructions as a whole only required petitioner to raise only a "reasonable doubt" as to whether he suffered from mental disease or defect which prevented him from having a purposeful or knowing state of mind with respect to the offenses charged. McKenzie (II), 581 P.2d at 1235.

Petitioner's interpretations of jury instructions regarding proof of his mental state do not accord with those of the Montana Supreme Court, nor with the plain and unequivocal language of the instructions. Mental state instructions were given as Added Instructions 30 through 38, Ct. File Item 154, which are reproduced as Appendix C to the Petition for Writ of Certiorari. A defendant's mental state can never be proved directly; it is proved through inferences and conclusions drawn by the jury from a defendant's overt conduct or acts. Cramer v. United States, 325 U.S. 1, 31 (1945). The instructions in this case did no more than educate the jury as to the manner in which it was to draw inferences and conclusions. One instruction to which petitioner objects states that a person is presumed to intend the ordinary consequences of his voluntary acts. A similar instruction was approved in Cramer v. United States, supra, 325 U.S. at 31, and was triggered only if the jury first found that the acts were committed voluntarily. Ultimately, petitioner's arguments concerning the use of presumptions are simply irrelevent. Petitioner was convicted of aggravated kidnaping and deliberate homicide by means of torture. Conviction for each crime required a finding of a specific intent or specific purpose, and the jury was emphatically instructed that to find a particular purpose, it could not employ any presumptions:

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> In offenses which require proof of a particular purpose the purpose required may never be proved by means of legal presumptions, but must be proved by means of inferences only. In this case the offenses of: Deliberate Homicide By Means of Torture and Aggravated Kidnaping - all require proof that the defendant committed the particular act charged for a particular purpose, in addition to proof that he committed said act either knowingly or purposely.

Add. Instruction 32, Ct. File Item 154. This instruction was repeated and reemphasized in later instructions dealing with proof of aggravated kidnaping, Add. Instruction 36, and deliberate homicide by means of torture, Add. Instruction 34.

III. PETITIONER FAILS TO SHOW AN ENFORCEABLE PLEA BARGAIN AGREEMENT

Citing Santobello v. New York, 404 U.S. 267 (1971), petitioner requests this Court to review and enforce a proported plea bargain agreement.[21] The Montana Supreme Court, reviewing the record of the trial court, determined that there was never a plea bargain agreement which could be enforced. McKenzie (II), 581 P.2d at 1214. That finding, although not binding on this Court, is entitled to great weight. Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976); Pickering v. Board of Education, 391 U.S. 563, 578 (n.2) (1968)(Douglas, J., concurring).

Santobello held that when a defendant enters a plea of guilty in exchange for an agreement by the prosecutor to make a particular sentencing recommendation, the prosecutor's promise must be enforced or the defendant allowed to withdraw his guilty plea. The reasons for enforcing a plea

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[21] Petitioner's argument illustrates the sometimes schizophrenic nature of criminal appeals. While petitioner maintains his innocence in requesting reversal of his conviction, he requests a confession of guilt be accepted.

bargain agreement are apparent. The defendant, by pleading guilty, gives up important constitutional rights, including the right to trial by jury; the right to be confronted by witnesses; and the right against self-incrimination. Petitioner never waived these rights. At most, his attorney made vague and unspecified disclosures concerning trial strategy in an attempt to clinch a tenative plea bargain agreement.

Petitioner's version of the plea bargaining powers is set forth in his attorney's affidavit dated December 30, 1974 (Ct. File Item 99), a copy of which is set forth in an appendix attached hereto at pp. A-14 through A-19. The information allegedly disclosed by defense counsel to prosecutors is set forth in the most general and self-serving terms:

> Subsequent to this meeting with the court, counsel for the Prosecution and the Defendant met in the O'Haire Manor; pursuant to the tacit agreement to aid the Prosecution control the influence of public opinion by the Sheriff of Pondera County, (sic) your affiant outlined the strategy and those facts that would have been emphasized by the defense had this matter gone to trial; that your affiant explained to the Prosecution its problem areas of proof as visualized by counsel for the defense; that this information was provided to justify the agreements heretofore entered into and to explain to the Sheriff that it was through his own ineptitude that put the prosecution to the problem of possibly not being able to get certain very pertinent evidence before the Court and jury and where certain assumptions being made by the Sheriff and Prosecution were fallacious. *** (Page 4.) (Emphasis supplied.)

Nowhere does petitioner explain how such disclosure, whatever it was, interfered with his defense or gave the prosecution an unfair advantage. He did not waive any right to object to admission of evidence based on ineptitude in the investigation; how the prosecutor could have avoided such objections is a matter of speculation. The affidavit of

petitioner's counsel reveals that plea bargaining was initiated by defense counsel, who suggested the possibility of a plea almost a year after petitioner's arrest. Even after suggesting the possibility of a plea for a second time, the prosecutor "left your affiant with the impression that he either did not appreciate the nature of your affiant's effort or that he would have to secure the advice of the Special Prosecutor ***." (Affidavit, p.1.) The affidavit contains conclusory statements of defense counsel's "understanding" that a "final and complete bargain" had been struck, but no evidence is offered to show that the prosecutor committed himself to any agreement. Petitioner's own evidence shows no more than defense counsel's voluntary disclosure of vague information concerning trial strategy in an effort to "nail down" a favorable plea arrangement for his client.

IV. PETITIONER'S SEARCH AND SEIZURE ARGUMENT PRESENTS TRITE LEGAL AND FACTUAL SEARCH AND SEIZURE ISSUES AND FAILS TO DEMONSTRATE THE EXISTENCE OF SIGNIFICANT FOURTH AMENDMENT ISSUES.

Respondent agrees with petitioner's prefatory characterization of his search and seizure arguments as "recurrent." Every search and seizure presents a question of "probable cause",[22] one of the grounds alleged for review, and the authority of law enforcement officers to seize

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[22] Petitioner's characterization of the probable cause issue is misleading. He states the issue as being "the circumstances under which probable cause to arrest may furnish probable cause to search a dwelling ***." Petition, p. 53 (Emphasis added.) A search warrant for the dwelling in question was issued, a copy of which is reproduced in the dissenting opinion in McKenzie (II), 581 P.2d at 1241. The search was not justified as incidental to arrest.

particular items is always at issue where an item seized is not exactly described in a warrant.

Petitioner's probable cause arguments are based upon his placid but erroneous assumption that the facts which support a finding of probable cause to arrest cannot, without more, support a probable cause finding for a search warrant. Nonsense! In some cases the facts may support a finding of probable cause to arrest only, but in others those same facts may support a probable cause finding for both arrest and a search warrant. There is no significance whatsoever in the fact that the same facts supported both petitioner's arrest and a warrant to search his house and truck.

Probable cause determinations are not made on technicalities and "issuing magistrates are not to be confined by niggardly limitations or by restrictions on their use of common sense." Spinelli v. United States, 393 U.S. 410, 419 (1969). An application of common sense to the facts presented to the justice of the peace in this case,[23] overwhelmingly supports findings of (1) probable cause to believe that the victim, Lana Harding, had been assaulted and abducted; (2) probable cause to believe that the petitioner was connected with that assault and abduction; (3) probable cause to believe that petitioner's pickup truck had been used in connection with the assault and abduction; and (4) probable cause to believe that items of petitioner's or victim's clothing were to be found in petitioner's house. The victim, Lana Hardin, was missing. There was evidence of

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[23] The facts supporting the issuance of the search warrant are recited in the majority opinion in McKenzie (II), 581 P.2d at 1212. A copy of the affidavit supporting the application for the search warrant is reproduced in the dissenting opinion, 581 P.2d at 1240.

a struggle inside her teacherage, and a drag trail and tennis shoe were discovered outside the teacherage. Blood stains and a woman's watch were discovered in the same area where petitioner and his pickup truck were observed the evening of the abduction. Petitioner was observed at that time in a highly nervous, excited and out of breath condition. He solicited help in starting his truck, which was parked one hundred feet from where the watch and blood stains were discovered, and indicated that he was going home.

The clothes worn by petitioner the evening of the abduction were obvious evidence in a criminal investigation. The abduction had taken place under circumstances indicating violence and struggle. The clothes worn by the assailant could be expected to have the victim's hair, tissue or blood on them. The petitioner, who lived nearby, would likely have worn those clothes home.[24]

The second aspect of the search and seizure issue advanced by petitioner is that the search of the petitioner's house was a "general" search based upon a "general warrant."

Petitioner's attack on the warrant is based upon the language authorizing the search and seizure of "any other

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[24] In his dissent, Justice Shea asserts that here was no evidence supporting a finding of probable cause that the victim's clothing would be found at either petitioner's home or in his pickup.

> In this case no evidence was present as to the probability of the clothing being at the home or in the pickup truck. Moreover, logically speaking, it would be highly improbable that her clothing would be there. The probability would be that a defendant would have destroyed them or disposed of them in a place less likely to implicate the defendant. (Emphasis added.)

581 P.2d at 1261. The dissent assumes that every criminal acts rationally and logically and destroys or covers up all the evidence related to his crimes. If the observation is correct, then no search warrant could ever issue as there would be no evidence to discover. The assertion also overlooks the petitioner's clothing as evidence.

contraband articles." That language appeared after an enumeration of specific articles of clothing of the victim and petitioner for which search was authorized. A warrant is not destroyed by the use of the phrase "and any other contraband articles," as contended by petitioner. The warrant here did not authorize a general exploratory search. The test of the warrant is whether the place to be searched and the items to be seized are as precisely identified in the warrant as the nature of the activity permitted, and when an exact description of instrumentalities is made impossible by the circumstances, reference to a generic class of the items to be seized is sufficient. James v. United States, 416 F.2d 467 (5th Cir., 1969), cert. den. 397 U.S. 907 (1970). The phrase "any other contraband" is similar to the phrase "any other evidence," use of which has been sustained, and is not an authorization for a general search. Quigg v. Estelle, 492 F.2d 343 (9th Cir., 1974), cert. den. 419 U.S. 848 (1974). As Quigg points out, such a phrase is merely a codification of the authority to seize certain items under the "plain view doctrine."

Petitioner takes issue with the seizure of two items of clothing, a pair of Red Wing boots and a plaid jacket, which were not specifically enumerated in the warrant.[25] Petitioner ignores the plain view doctrine as it applies to the facts of the search. Under the plain view doctrine,

---

[25] In footnote 75 of his petition, petitioner states that the boots were one of the most damaging items of evidence against petitioner since their soles matched the boot imprints found inside a pair of overshoes on which the victim's blood and brain tissue were found. Respondent wonders how petitioner would describe the effect of other evidence introduced at trial, such as the exhaust manifold seized from the back of his truck and which had the victim's blood and cortical tissue on it, and was identified as being the weapon which could have inflicted the death blow.

evidence may be seized if (1) the initial intrusion of the police was justified by a valid search warrant; (2) the discovery of the unlisted items was inadvertent (the police did not have prior knowledge of and prior intent to seize those items not described in the warrant, nor does the petitioner argue that such was the case); and (3) the evidence seized was of an incriminating nature. Coolidge v. New Hampshire, 403 U.S. 443 (1971). In the present case, the officer who executed the warrant testified that the Red Wing boots were seized because their tread design was similar to tracks observed outside the teacherage, and that the clothing seized was basically that which an individual observed petitioner wearing on the night of the homicide. The items were incriminating objects, for which officers had probable cause to believe were evidence of a crime. United States v. Ross, 527 F.2d 984 (4th Cir, 1976), cert. den. 424 U.S. 945 (1976); United States v. Sedillo, 496 F.2d 151 (9th Cir, 1974), cert. den. 419 U.S. 947 (1974).

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CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 22nd day of November 1978.

MICHAEL T. GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

MIKE McCARTER
Assistant Attorney General

STATE PUBLISHING CO HELENA MONT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5617

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

CERTIFICATE OF SERVICE

I, MICHAEL T. GREELY, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Respondent's Brief in Opposition to Certiorari in the above case on counsel for the petitioner by depositing same in the United States mail, first class mail, postage prepaid, addressed as follows:

BARNEY REAGAN
Post Office Box 342
Cut Bank, Montana 59427

CHARLES L. JACOBSON
Post Office Box 932
Conrad, Montana 59425

TIMOTHY K. FORD
2200 Smith Tower
Seattle, Washington 98104

JACK GREENBERG
JAMES M. NABRIT III
DAVID E. KENDALL
JOEL BERGER
10 Columbus Circle
New York 10019

ANTHONY G. ARMSTERDAM
Stanford University Law School
Stanford, California 94305

DATED this 22d day of November 1978.

MICHAEL T. GREELY
Attorney General
State of Montana
Attorney for Respondent

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 95-2201, Mont. Rev. Codes Ann.

> "This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

Section 95-2203, Mont. Rev. Codes Ann.

> "No defendant convicted of a crime which may result in commitment for one (1) year or more in the state prison, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court, unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense."

Section 95-2204, Mont. Rev. Codes Ann.

> "Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court."

Section 95-2501, Mont. Rev. Codes Ann.

> "The chief justice of the supreme court of Montana shall appoint three (3) district court judges to act as a review division of the supreme court and shall designate one of such judges to act as chairman thereof. The clerk of the Montana supreme court shall record such appointment and shall give notice thereof to the clerk of every district court.

STATE PUBLISHING CO HELENA MONT

This review division shall meet at least four (4) times a year or more as its business requires as determined by the chairman. The decision of any two (2) of such judges shall be sufficient to determine any matter before the review division. No judge shall sit or act on a review of sentence imposed by him. In any case in which review of a sentence imposed by any of the judges serving on the review division is to be acted on by said division, the chief justice of the supreme court of Montana may designate another judge to act in place of such judge. The review division shall hold its meetings at Deer Lodge, and may adopt any rules and regulations which will expedite their review of sentences. The division is also authorized to appoint a secretary and such clerical help as it deems adequate and fix their compensation."

Section 95-2502, Mont. Rev. Codes Ann.

"Any person sentenced to a term of one (1) year or more in the state prison by any court of competent jurisdiction may, within sixty (60) days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the district court in the county in which judgment was rendered, an application for review of the sentence by the review division. Upon imposition of the sentence the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in decrease or increase of the sentence within limits fixed by law. The clerk shall transmit such application to the review division and shall notify the judge who imposed the sentence, and the county attorney of the county in which the sentence was imposed. Such judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven (7) days, if requested to do so by the review division. The review division may for cause shown consider any late request for review of sentence and may grant such request. The filing of an application for review shall not stay the execution of the sentence."

Section 95-2503, Mont. Rev. Codes Ann.

The review division shall, in each case in which an application for review is filed in accordance with 95-2502, review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time, and may order such different sentence or sentences to be imposed as could have been imposed at the time of imposition of the sentence under review, or may decide that the sentence under review should stand. In reviewing any judgment, said division may require the production of presentence reports, and any other records, documents, or exhibits relevant to such review proceedings. The appellant may appear and be represented by counsel, and the state may be represented by the county attorney of the county in which the sentence was imposed. If the review division orders a different sentence, the court sitting in any convenient county shall resentence the defendant as ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted. The decision of the review division in each case shall be final and the reasons for such decision shall be stated therein. The original of each decision shall be sent to the clerk of the court for the county in which the judgment was rendered and a copy shall be sent to the judge who imposed the sentence reviewed, the person sentenced, the principal officer of the institution in which he is confined and the decision shall be reported in the Montana Reports."

Section 95-2601, Mont. Rev. Codes Ann.

"Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, upon any ground of alleged error available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy may move the court which imposed the sentence or the supreme court or any justice of the supreme court to vacate, set aside, or correct the sentence."

Section 95-2602, Mont. Rev. Codes Ann.

> "The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place or the clerk of the supreme court a verified petition. The clerk shall docket the petition upon its receipt and bring the same promptly to the attention of the court."

Section 95-2603, Mont. Rev. Codes Ann.

> "The petition shall identify the proceeding in which the petitioner was convicted, give date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. They shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Arguments and citations and discussion of authorities shall be omitted from this petition."

Section 95-2604, Mont. Rev. Codes Ann.

> "A motion for such relief may be made at any time after conviction."

Section 95-2608, Mont. Rev. Codes Ann.

> "Either the petitioner or the state may appeal to the supreme court of Montana from an order entered on the motion. The appeal shall be taken within six (6) months from the entry of the order."

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

THE STATE OF MONTANA, Plaintiff, -vs- DUNCAN PEDER McKENZIE, JR., Defendant.	Criminal Action No. 6593A PETITION AND MOTION IN MITIGATION

COMES NOW, the Defendant, and petitions and moves the Court to find and grant mitigation as follows:

1. That the Defendant was found guilty by the verdic of a jury on February 1, 1975, of the offenses of Deliberate Homicide and Aggravated Kidnapping; that upon both verdicts special interrogatories asked of the jury and were answered in the affirmative establishing a jury determination that the Deli berate Homicide was committed by means of torture and that the Aggravated Kidnapping resulted in death of the victim;

2. That both such verdicts may carry a purported man- datory penalty of death "unless there are mitigating circumstanc (the phrase quoted above is no longer found in the statute [94-5-304 M.C.C. 1973] covering aggravated kidnapping as the sam was deleted in Section I of Chapter 126 of the Laws of 1974 whic became effective March 11, 1974 which was 48 days after the e- vents allegedly took place which form the basis for offenses charged in this cause).

3. That Defendant contends and asserts that the phrase, "unless there are mitigating circumstances", renders both statutes (94-5-105 and 94-5-304 M.C.C. 1973) unconstitution as being violative of the rule expressed in Furman v. Georgia, 408 U.S. 238 (1973) as such provision allows discretion in the

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determination as to what are and whether there are any "mitigating circumstances".

4. That both verdicts returned by the jury in this case are not general verdicts as required by statute to be returned by juries in criminal matters, but are either (a) a special verdict not authorized or permitted to be returned by a jury in a criminal matter or (b) a general verdict qualified by a special interrogatory not authorized or permitted by statute; that in either event, the verdict is contrary to both law and the evidence submitted or heard in this matter and the portion thereof containing this special interrogatory or special verdict should be disregarded by the Court as any legal or binding return by the jury, the jury being without power to so find, and the matter therein contained being matter for the Court's determination only. Upon sentencing, the Court should not feel bound to find in compliance with the answers given by the jury to the special interrogatories and such answers being contrary to the law and the evidence the Court should disregard the same in sentencing.

5. That the Court should not impose sentence or penalty upon this Defendant for both Deliberate Homicide and Aggravated Kidnapping, both offenses having arisen from the same transaction and each of said offenses being established by proof of the same or less than all the facts required to establish the other and that for the Court to impose sentence or penalty upon both Deliberate Homicide and Aggravated Kidnapping would constitute a violation of 95-1711 R:C.M. 1947;

6. It is generally understood that any person has the right to present matters in mitigation of sentence;

7. The Court herein has advised Defendant that it is receptive to, and will hear, any matter in mitigation;

8. However, the Defendant is at a loss to determine whether what the Court refers to is the mitigation spoken of in

the above described statutes or the mitigation generally allowable in any sentencing (unless of course the Court is without discretion in the setting or imposition of sentence);

9. The Court is surely aware of the mitigating circumstances relating to the Defendant's mental condition. Defendant had a well-recognized and qualified psychiatrist testify to the effect that Defendant so suffered from mental disease or defect that he could not have had the requisite intent and that such disease or defect should exclude responsibility. (The jury, however, did not find such mental disease or defect; however, Defendant asserts that the statutory method of presenting such concept to the jury precluded such finding and the Court's refusal to apprise the jury as to disposition of Defendant if such verdict were returned left them with the dilemma of either convicting Defendant or perhaps immediately turning him loose upon society since they were not informed as to the mandatory disposition after verdict of not guilty by reason of mental defect or disease excluding responsibility; that both psychiatrists and the psychologist all testified that Defendant certainly suffered from a "personality disorder" and that he was dangerous; the only difference of opinion was to the degree of such personality disorder; and that the Court should consider such proof presented by both the prosecution and the defense and the lack of proper instruction as a mitigating circumstance in imposing sentence;

10. The Court should further take into consideration that Defendant is but 23 years old; that he left his mother at age 12 and went to live with his itinerant ranch-worker father; that he has no friends or roots; that he is an indigent stranger to the Conrad and Great Falls communities and was and is unable to provide any character witnesses at trial or now; that he has a wife and three (3) children in the Chinook, Montana community and that society would benefit by returning him to them after

corrective medical treatment more than it would for punishing him for the sins society has done against him;

11. That the Eighth Amendment to the U. S. Constitution and Section 22 of Article II of the 1972 Montana Constitution prohibits cruel and unusual punishments; that no death penalty has been imposed and inflicted in Montana in over thirty years; that to impose such a penalty in this cause (where discretion is allowed) would be an abuse of that discretion and such would be the imposition of cruel and unusual punishment;

12. That the new 1972 Montana Constitution states in Section 28, Article II as follows:

"Laws for the punishment of crime shall be founded on the principles of prevention and reformation....";

That to impose a sentence of death would be in direct conflict with the mandate of this Constitutional provision; that the sentence of death is unconstitutionally violative of the above quoted Section of the Montana Constitution of 1972;

13. That this Court has heretofore entered into a plea bargaining agreement with counsel for the State and the Defendant on December 23, 1974; that although the Court has refused to specifically enforce said agreement of December 23, 1974, it has yet not broken it; that the Court therein promised Defendant that it would not impose a sentence in excess of fifty (50) years; that the U.S. Supreme Court has held that such agreements must be enforced in Santobello v. New York, 404 U.S. 257, 30 L.Ed. 2d 427, 92 S. Ct. 495; that the information obtained from the defense by the prosecution, and fully taken advantage of, by the prosecution, may well be the real basis for the jury's verdict in this cause; that the Court's sense of justice and fair play must well be involved by the action of the prosecution repudiating, and fully taking advantage of the unfair position obtained under the agreement all made and entered into on December 23, 1974;

WHEREFORE, Defendant prays the Court as follows:

1. To sentence upon a single verdict only and not upon both verdicts;

2. To disregard the special interrogatory answers given by the jury as verdicts which the jury was not entit to decide and as contrary to both the law and the facts in evidence;

3. To find mitigating circumstances and to impose a mitigated penalty because of such finding;

4. To not impose a sentence of death; and

5. To impose a sentence not to exceed fifty (50) yea

DATED thi 25th day of February, 1975.

BARNEY REAGAN
CHAS. L. JACOBSON
Attorneys for Defendant

By: Barney Reagan

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PONDERA

* *

STATE OF MONTANA, Plaintiff, vs. DUNCAN PEDER McKENZIE, JR., Defendant.

Cr. No. 709

AMENDED INFORMATION

* *

At a term of the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Pondera, at Conrad, the County Seat of said County, DAVID H. NELSON, County Attorney of said County of Pondera, now here in Court, upon leave granted by this Honorable R. J. NELSON, presiding Judge in the above entitled matter, and upon belief and information makes that DUNCAN PEDER McKENZIE, JR., late of the County of Pondera, on or about the 21st day of January, A. D. 1974, at the County of Pondera, in the State of Montana, committed the following crimes in the following Counts all at locations in Pondera County, Montana, said Counts being pursuant to the Montana Criminal Code of 1973, which is Title 94 of the Revised Codes of Montana 1947, as amended, to-wit:

COUNT 1: That DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, by purposely or knowingly causing the death of LANA HARDING, a human being;

and section 94-5-103

in violation of Section 94-5-101, R.C.M. 1947.

DEC 6 [illegible]

IN [illegible] COUNTY

Clerk

COUNT 2: That DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, by causing the death of LANA HARDING, a human being, while the said DUNCAN PEDER McKENZIE, JR. was engaged in the commission of, or in an attempt to commit, or flight after committing or attempting to commit:

1. SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, by knowingly having sexual intercourse with the said LANA HARDING, a female not his spouse, without consent, the said DUNCAN PEDER McKENZIE, Jr being a male person; or

2. AGGRAVATED ASSAULT, a felony involving the use or threat of physical force or violence against the said LANA HARDING, by purposely or knowingly causing:

   a. serious bodily injury to the said LANA HARDING; or

   b. bodily injury to the said LANA HARDING with a weapon, namely:

      1. a rope, by placing said rope around the neck of the said LANA HARDING; or

      2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object; or

that the said DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, as above alleged, by causing the death of the said LANA HARDING:

1. by mean of torture; or

2. by lying in wait or ambush;

in violation of Section 94-5-101, 94-5-102, 94-5-103 and 94-5-202, R.C.M. 1947.

COUNT 3: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED KIDNAPPING, a felony, by knowingly or purposely and without lawful authority restraining LANA HARDING by either secreting or holding the said LANA HARDING in a place of isolation, or by using or threatening to use physical force with the purpose of facilitating the commission, or flight thereafter, of the felony:

1. SEXUAL INTERCOURSE WITHOUT CONSENT, by knowingly having sexual intercourse with the said LANA HARDING a female not his spouse, without consent, the said DUNCAN PEDER McKENZIE, JR. being a male person; or

2. AGGRAVATED ASSAULT, by purposely or knowingly causing:

a. serious bodily injury to the said LANA HARDING; or

b. bodily injury to the said LANA HARDING with a weapon, namely:

1. a rope, by placing said rope around the neck of the said LANA HARDING; or

2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object;

in violation of Sections 94-5-303, 94-5-503 and 94-5-202, R.C.M., 1947, the said LANA HARDING having died as a result of said criminal conduct.

COUNT 4: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED KIDNAPPING, a felony, by knowingly or purposely and without lawful authority restraining LANA HARDING by either secreting or holding the said LANA HARDING in a place of isolation, or by using or threatening to use physical force, with the purpose of inflicting bodily injury on the said LANA HARDING or terrorizing the said LANA HARDING, in violation of Section 94-5-303, R.C.M. 1947, the said LANA HARDING having died as a result of said criminal conduct.

COUNT 5: That DUNCAN PEDER McKENZIE, JR., a male person, committed the crime of SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, by knowingly having sexual intercourse with LANA HARDING, a female not his spouse, without consent, in violation of Section 94-5-503, R.C.M. 1947.

COUNT 6: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED ASSAULT, a felony, by purposely or knowingly causing serious bodily injury to LANA HARDING, in violation of Section 94-5-202, R.C.M., 1947.

COUNT 7: That DUNCAN PEDER McKENZIE, JR. committed the crime of AGGRAVATED ASSAULT, a felony, by purposely or knowingly causing bodily injury to LANA HARDING with a weapon, namely:

1. a rope, by placing said rope around the neck of the said LANA HARDING; or

2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object;

in violation of Section 94-5-202, R.C.M. 1947.

contrary to the form, force and effect of the statutes in such case made and provided above, and against the peace and dignity of the State of Montana.

David H. Nelson
County Attorney, Pondera County,
State of Montana

STATE OF MONTANA)
: ss.
County of Pondera)

DAVID H. NELSON, being first duly sworn, says that he, said affiant, is the County Attorney of Pondera County, Montana, and on information and belief says that the facts stated in the foregoing information consists of four (4) pages are true and that the Defendant therein named is guilty of the offense charged as therein set forth.

David H. Nelson

SUBSCRIBED AND SWORN to before me this 3rd day of September, A.D., 1974.

SEAL

Clerk

by:
Deputy Clerk

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

STATE OF MONTANA, Plaintiff, vs. DUNCAN PEDER McKENZIE, JR., Defendant.

Criminal Action No. 4534

AFFIDAVIT

STATE OF MONTANA)
:ss
County of Pondera)

DEC 30 1974
FLORENCE McCARTHY
Clerk of Court

BARNEY REAGAN, after being duly sworn upon his oath, deposes and says:

That he is one of the attorneys appointed and acting on behalf of DUNCAN PEDER McKENZIE, JR., Defendant herein;

That on or about the 9th day of December, 1974, Defendant authorized your affiant, together with co-counsel, CHAS. L. JACOBSON, to enter into meaningful negotiations with the representatives of the State of Montana for the purpose of plea bargaining in the above entitled action;

That subsequent to that date various offers, feelers or suggestions concerning plea bargaining were presented to the Pondera County Attorney; however, at each such attempt said County Attorney left your affiant with the impression that he either did not appreciate the nature of your affiant's effort or that he would have to secure the advice of the Special Prosecutor (who is also the County Attorney elect, having defeated the County Attorney in the November election);

That as of December 27th, 1974, your affiant had not received any direct response from his "offers, feelers and suggestions" either from the County Attorney or the Special Prosecutor; that on said date your affiant came into personal contact with the Special Prosecutor, and directly presented the matter of the De-

fendant's willingness to enter into a bargaining situation whereby the Defendant would enter a plea of guilty as to some specific allegations contained in the Information in return for a pre-determined and agreed-upon sentence;

Such negotiations proceeded, now with the efforts and attendance of both counsel for Defendant and both counsel (County Attorney and Special Prosecutor) for the State; on the morning of December 22nd, 1974, (Sunday) it was mutually agreed by all representatives of the prosecution and Defendant that the Defendant would enter a plea of Guilty to portions of the allegations contained in Counts II and VII; that said plea would have the effect of pleading Guilty to Deliberate Homicide while in the commission of a felony, to-wit: Aggravated Assault with a heavy weapon, and Guilty to Aggravated Assault while in the commission of bodily injury upon the deceased with a weapon, to-wit: namely, a rope; and that Defendant would receive a sentence of fifty (50) years and twenty (20) years respectively; both sentences to run concurrently and not consecutively; all parties agreed and understood that this agreement would not be binding upon, and would be subject to the approval of the presiding Judge in this cause;

The Special Prosecution expressed fears concerning public reaction to this effort, and most expressly was worried over the reaction of the Sheriff of Pondera County and the family of the deceased;

It was the Special Prosecutor's avowed initial intention to present all of this to the said Sheriff and family of the deceased before making our mutual presentation to the Court; it was the apparent understanding of all concerned, and especially this affiant, that if the Prosecution could not secure the approval of said Sheriff and the family of the deceased, that there would probably not be any necessity of presenting the situation to the Court;

Your affiant then advised the Prosecutor that he was privy to certain information, that would be used at trial, that could be used to demonstrate to the Sheriff that his efforts had put the Prosecution into such a position that it was in their best interest to proceed in this manner; such information was not provided the State at this time; and it was understood that such would be provided upon a committment by the Court;

The Prosecution then deemed it more expedient to approach the Court with this situation prior to any other consultation; that it was never the intention of your affiant, or his co-counsel to ever allow the Sheriff of Pondera County or the family of the deceased, to have the power of "veto" over the negotiations then taking place, but that since contact with them would be made prior to our mutual approach to the Court, no harm to Defendant would be done; however, your affiant's attitude as it related to their being consulted after the mutual contact with the Court was opposite.....if the Court refused to accept the plea bargain, the matter would be halted, or if the Court accepted the offer, the Prosecution's contact with the Sheriff and family of the deceased would be for the purpose of pro forma consultation for the purpose of courtesy and to attempt to reduce the possibility of these parties causing adverse public opinion within Pondera County against either the County Attorney or the Special Prosecutor.

On Monday, December 23rd, 1974, all counsel in this matter met with the Honorable R. J. Nelson in his chambers in Great Falls for approximately three (3) hours; although the Court expressed a dislike for the entire affair, and especially the length of sentence agreed upon, the Court agreed to allow the plea and give the sentence agreed upon (although the Court felt it could only give the fifty (50) year sentence for both offenses; that was mutually understood and agreed upon).

The Court then ordered all parties, including Defendant to

appear on Monday, December 30, 1974; to appear and at this time Defendant would withdraw his plea and enter his new plea as per our mutual understanding.

Subsequent to this meeting with the Court, counsel for the Prosecution and the Defendant met in the O'Haire Manor; pursuant to the tacit agreement to aid the Prosecution control the influencing of public opinion by the Sheriff of Pondera County, your affiant outlined the strategy and those facts that would have been emphasized by the defense had this matter gone to trial; that your affiant explained to the Prosecution its problem areas of proof as visualized by counsel for the defense; that this information was provided to justify the agreement heretofore entered into and to explain to the Sheriff that it was through his own ineptitude that put the Prosecution to the problem of possibly not being able to get certain very pertinent evidence before the Court and jury, and where certain assumptions being made by the Sheriff and Prosecution were fallacious;

That your affiant and co-counsel left this meeting with the complete and unequivocal understanding that a final and complete bargain had been struck by all parties including the Court; that counsel for the Prosecution were then going to apprise the family of the deceased and the Sheriff of Pondera County of this agreed upon situation;

That on Saturday, December 28, 1974, at approximately 3:00 o'clock P. M., the Special Prosecutor advised your affiant that he had travelled, together with the County Attorney, to Polson, Montana, and had contacted the family of the deceased (Hardings) and their attorney, Senator Jean Turnage; that Mr. Harding was irascible to the point of threatening violence upon the Defendant and his counsel, and that they were adamant that no such understanding should be allowed to proceed; and that the Special Prosecution then proceeded to rationalize his refusal to proceed

in accordance with the agreement already made; that as part of such rationalization, the Special Prosecutor complained that Defendant could have backed out of the deal at any time prior to sentencing; that your affiant agreed that such were possible, but for Defendant to do so he would have to do so pro se and that his counsel would have had a duty to make every effort to withdraw as counsel of record, and that any resulting delay in trial would have been caused by Defendant;

That your affiant believes, and has reason to believe, that in spite of the "Gag Order" heretofore filed in this cause, counsel for the Prosecution has not only discussed this matter with the heretofore mentioned Hardings, but has also been in direct contact with two other District Judges seeking their advice and counsel;

That your affiant believes, and has reason to believe, that the counsel for the State, both County Attorney and Special Prosecutor, have misled counsel for Defendant, violated, or are attempting to violate, the rights of Defendant, and have engaged in unethical conduct in violation of the Canons of Professional Ethics and the Code of Professional Responsibility (See Canons 5,6,7,8,9,15,16,22,24,25,31,32,35, and 41 of the Canons of Professional Ethics).

That your affiant believes,and has reason to believe, that he has a duty to the Court, his client, and counsel for the Prosecution to bring this entire matter before, and to lay it exposed to, this Honorable Court in the interests of justice and fair play to both the State and the Defendant.

Further your affiant sayeth not.

DONE this 30th day of December, 1974.

BARNEY REGAN

SUBSCRIBED AND SWORN to before me this 30th day of December, 1974.

(SEAL)

Notary Public for the State of Mon
Residing at Conrad, Montana
My Commission expires Aug. 25, 197